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CONSTITUTION-MAKING IN A
DEMOCRACY

Theory and Practice in New York State

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CONSTITUTION-MAKING IN A DEMOCRACY

Theory and Practice in New York State

BY

VERNON A. O'ROURKE

Assistant Professor of Political Science, Swarthmore College

AND

DOUGLAS W. CAMPBELL

Assistant Professor of Government, Union College

BALTIMORE

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PREFACE

The constitutional convention as an instrument of democracy has tended to rest securely in the realm of legal and political theory. The convention has been more often depicted as the fountain-head of ideal democracy than described in terms of the processes and forces of which it is a function. There has been increasing recognition by students of government, however, that the roots of representative government lie in the organized leadership and force of a multiplicity of interest groups (including political parties). A realistic study of the processes of democracy, therefore, must analyze formal institutions with these intermediate forces and institutions in mind.

The constitutional convention held in New York State in 1938 provided an excellent opportunity to make an analytical and systematic study of this democratic institution. While presenting an objective description of the processes by which the constitutional convention was brought into being and performed its work, we have sought also to reveal this instrument in the context of the democracy of which it is a part. To achieve this objective we have deemed it expedient to make a careful, preliminary analysis of the theory and the practice of constitution-making, with some attention to its historical-institutional evolution. In conclusion, an effort has been made to assess the value to representative government of the constitutional convention process, and to suggest ways of strengthening this institution. Our major premise in this study is that democracy will gain from realistic analyses of its working instruments, and, conversely, that it will suffer from the perpetuation of abstract doctrines which ignore or deny the realities of democracy in action.

The authors here acknowledge their very considerable debt to several persons who contributed both ideas and

encouragement to the construction of this work. Mr. Warren Moscow, Albany correspondent of *The New York Times*, deserves special mention. His penetrating reports to his paper while the convention was in session provided us with invaluable insights into the operations of that body. And, since 1938, he has willingly spent many hours with us talking over the "politics" of the convention. His assistance cannot be measured alone by the number of times his words appear in the pages of this book. We wish also to express our gratitude to Professors Carl B. Swisher and Johannes Mattern of The Johns Hopkins University, and to Professor Max Wainger of Union College. Each of these friends and colleagues read the manuscript and offered innumerable and valuable criticisms and suggestions. To Professor Edward S. Corwin of Princeton University, each of the writers owes a special debt, not only for his careful reading and criticism of the manuscript, but also for his kindness in writing the foreword which introduces this book.

Before concluding this preface we wish to make one more acknowledgment. To our wives, Rua and Jane, we express here our deep debt of gratitude for their assistance and encouragement at all stages of this undertaking. If this book has value, much of it must be attributed to their untiring efforts. To them this book is dedicated.

V. A. O'R.

D. W. C.

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FOREWORD

If, as the adage has it, "a good wine needs no bush," then neither does a good book need an introducer. "Introductions," "Forewords," and the like by persons other than the author have, nevertheless, come into such vogue within recent years that an author may well be pardoned for feeling that unless his contribution is formally blessed it will enter upon its career hopelessly handicapped. At any rate, when my young friends, Professors Campbell and O'Rourke, paid me the compliment of inviting me to furnish their volume a Foreword, I was delighted to comply, hoping that at least I would do their progeny no lasting harm.

Constitution-Making in a Democracy is a case study of a fundamental American institution, the state constitutional convention, the "case" being the New York State Convention of 1938. The work is addressed to a rather wide range of interests in the general field of Political Science. Students of the forms of constitutional government, students of political parties, public opinion and pressure groups, and students of American public law will all find that it will reward attention. Being myself interested primarily in public law, it is from that angle of the subject that I shall set out—where I shall wind up is another matter.

The present war has made us all aware as never before of the extent to which Political Science, and more especially American political science, is dependent upon *axioms*, which are customarily defined as "self-evident truths," but are frequently such only in the sense that no evidence exists to support them. Thus one axiom of Political Science, and the basic one of Western Public Law, is the concept of the State as "a sovereign political entity." Can such a concept be established by evidence? It could

be difficult to say; but so far as the effort has been made to this end it has usually taken the form of identifying the putative "sovereign political entity" with some tangible, visible political institution. Thus in the Third Reich the body politic is made manifest in the person of the Führer; in Great Britain it has long been identified with Parliament; while in the United States it is ordinarily authenticated by the Constitution-making mechanism, or more sharply, by the Constitutional Convention. As Professor Willoughby puts the matter in his *Fundamental Concepts of Public Law*, it is "the characteristic doctrine of American constitutional jurisprudence that the Constitutional Convention is, *par excellence*, the organ through which the citizen body of a state exercises that sovereign power which it is assumed to possess by virtue of the very fact that it is a body politic."

Thus while German political science, at the moment at least, and British political science are able to point to a daily operative institution of government as proof of the existence of the State, American political science has to put up with an institution which achieves corporeal existence only at intervals, between which the "sovereign political entity" undergoes presumably some sort of ghostly hibernation. In short, the American conception of the State puts the American political scientist to a somewhat special intellectual strain. What is more—and is also more immediately relevant to the business of getting Professors Campbell and O'Rourke's book launched—is the fact that this conception depresses the status of the daily operative institutions of government in relation to the putative body politic. The outstanding victim of this depressive process is, of course, the legislative branch of government. Originally the legislative branch was regarded, in harmony with the teachings of Locke and Blackstone, as constituting *the* body politic except at rare intervals of popular revolution. The legislature, it was said,

represented, that is to say, *re-presented* the People. But as constitution-making ceased to be a revolutionary phenomenon, and became a normal and expected political process, the Constitutional Convention came into its present status, thereby thrusting the legislature to a lower level of popular agency.

So the question arises whether this assumed disparity of representative capacity between the Constitutional Convention and the legislature should be treated as a mere axiom, or whether it does indeed answer to some supporting correspondence in facts appertaining to the organization and characteristic procedures of the Constitutional Convention. This latter question Professors Campbell and O'Rourke, on the basis of their study of the New York Convention of 1938, answer in the negative, as the following paragraph suffices to show:

"From time to time we have asserted in this study that it is difficult to distinguish the New York Constitutional Convention from a typical session of the state legislature. Some differences do appear, of course, and these have been noted in earlier pages. The convention was a unicameral body. Its jurisdiction was broader. Its membership, in the main, was drawn from different sources. Compared to the legislature the convention suffered from a chronic lack of responsible and effective leadership, at the same time enduring rougher handling by the organized pressures that besieged it. But in form, substance and spirit the convention could easily have passed for its technically inferior sister, the legislature. The convention was organized by the majority party. Key party and legislative officials manned its committees and acted as floor leaders. Patronage was dispensed according to principles well established by legislative practice. The very rules of convention procedure were taken over bodily from the New York Senate. Weeks of inactivity during the first two months of the convention's life sharply contrast with

the last three weeks when a flood of proposals was speedily disposed of amid scenes of confusion which practically every state legislature reenacts annually or biennially. And, finally, in both the convention and the legislature, party politics and pressure groups, mixed in varying quantities, constituted the primary forces guiding the deliberations and producing concrete results."

But does the above rather astringent estimate of the Constitutional Convention as the embodiment of the Sovereign People imply that it ought forthwith be discarded and the work of constitutional revision normally left to the initiative of the legislative branch? The Hon. Alfred E. Smith expressed himself to this precise effect on the floor of the New York Convention of 1938, but Messrs. Campbell and O'Rourke do not concur, nor on the other hand do they agree with those more moderate critics of the convention method who say that it "should be taken out of politics." Thus, as to the latter suggestion, they query, "Is this not, in effect, saying that we should take politics out of democracy?" And on the more fundamental issue of the retention of the Constitutional Convention, they add: "In a self-governing society it is salutary to give institutional expression to the fact that the authority of the people as a whole is superior to the authority of the political agents in charge of the daily conduct of things political." In other words, the Constitutional Convention ought to be retained if only to symbolize the idea that there is such a thing as the "People as a Whole."

However, these rather abstract considerations, which are perhaps open to the charge of begging the question, do not exhaust our authors' case for the Constitutional Convention. There is, they opine, "considerable evidence that the experience of popular constitution-making has a residual value of great importance to a self-governing society," and "to dismiss this experience as merely 'going thru motions,' is to distort essential psychological factors."

Lastly, they raise the question whether it is not possible to make popular participation in Constitution-making thru the Constitutional Convention "more effective." In this connection they cite a considerable list of suggestions that were offered on the floor of the New York Convention of 1938 for the improvement of Constitutional Conventions in that state, only one of which, a provision requiring that future conventions be summoned for "off" political years, was adopted. Nor do our authors give these happy ideas any great attention themselves. The essential problem as they envisage it is to provide a *better informed public*, and to that end they urge that a technically proficient constitutional revision committee, akin to a legislative council, be called into existence. Such a committee, they say, ought to be small and might well be permanent; at least it ought to function during the two years immediately prior to the submission to the voters of the question of a convention. Also, they suggest, more time ought to elapse between the submission to the voters of the proposals of a convention and the popular vote thereon.

A wealth of research has entered into the making of this book; as well as good, hard thinking, and clear, lucid writing; and the subject it so completely deals with is of first-rate importance. Both for their matter and their manner, Professors Campbell and O'Rourke deserve a wide audience not only among their fellow political scientists but also among publicists and public men.

EDWARD S. CORWIN.

Princeton University
Princeton, New Jersey
August 26, 1942.

CHAPTER I

CONSTITUTION MYTHS AND POLITICAL REALITIES IN AMERICAN DEMOCRACY

The Eighth Constitutional Convention of New York State recognized, in the opening session, its opportunity and its obligation to demonstrate the vitality of democracy. In calling the convention to order, the Honorable Edward J. Flynn, Secretary of State, declared:

You are assembled during a most critical time in the world's history, when new forms of government are being created throughout the world and democratic principles are being forgotten.

Judge Frederick E. Crane, upon his election to the presidency of the convention, addressed the delegates in similar vein:

We are here to do one thing, if nothing else: To prove to the world that our form of government does work; that it will work efficiently, and can meet the problems of the day and the necessities of the times as well and as intelligently as any other form of government; and that we are capable, by our earnestness and by our sincerity, in spite of all our differences, to rule ourselves and to provide a proper rule for those whose representatives we are.

In support of this primary objective, President Crane spoke at length on the "principles of constitutional government" upon which all would agree. These principles, he said, were freedom of speech, of religion, of the press, of the judiciary, and of the electorate.¹

This opening meeting of the convention was in the nature of a ceremony. On the level of formal dedication

¹ For the account of this opening meeting, see *Record of the Constitutional Convention of the State of New York 1938*, pp. 3-20. (This is the unrevised record of the proceedings, printed in 1938 by J. B. Lyon Co. of Albany, N. Y.).

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to high purpose it had meaning. The politics which entered into the staging of the ceremony remained behind the scenes. The problems, complexities, and difficulties which would arise remained in the future.² The characteristics of this inaugural meeting were destined to persist, however. The traditional pattern of thinking about constitutions and about constitution-making, which this constitutional convention inherited, has meaning chiefly on the level of ceremony. The politics of constitution-making, as it is actually practiced, is accorded little recognition in theories about constitution-making. The character and inter-relations of ceremony, of theory, and of practice are indistinct and confused. In confronting its self-acknowledged task of demonstrating the vitality of democracy, the 1938 New York State Constitutional Convention was handicapped by a divergency between democratic theory and democratic practice.

The people of American democracy find it difficult to know how both to use and to revere their political institutions. The source of this difficulty lies in the relation of specific institutions to the underlying ideals of democracy. When does a particular institution deserve a strong affirmation of loyalty, and when must its actual functioning be subjected to a keenly analytical, and perhaps negative, appraisal? Clearly, both attitudes are necessary. The balance between them must depend upon a full understanding of the relation of a given institution to the democratic ideal it seeks or claims to serve.

The difficulties of maintaining this balance have been further complicated by the antagonists of self-government.

² The mutual agreement which supported the ceremonial character of this first meeting is illustrated by the fact that Senator Robert F. Wagner, a Democratic delegate and leader of his party at the convention, withheld until a later meeting his insistence that the "principles of constitutional government" had been too narrowly stated. For a discussion of the politics which preceded the convening of the delegates in formal session, see below, Chapters III and IV.

Criticism of *particular democratic institutions* is interpreted by them to mean support for *alternative, anti-democratic ideals*. By a neat trick of argument, the imperfections of *self-governing institutions* are pointed to as a basis for a belief in the perfection of *both the institutions and the ideals of dictatorship*. The emphasis is upon existing discontents, rather than upon a demonstration of the superiority of the alternative institutions and ideals. This "strategy of error" infects democracy with a grave confusion. The protagonists of rule by dictation represent specific criticisms as being both a challenge of democracy's first principles and an argument for anti-democratic principles. In fact, however, democracy can survive only as its people have renewed faith that their capacity to examine critically and to improve their institutions can be exercised without damaging their democratic ideals. Vigilant guard must be kept to prevent the betrayal of democratic ideals by undue adulation of specific institutions, despite the flank attack by forces opposed to democracy.

The politics of government in the United States under the federal constitution has not fostered a clear distinction between ideals and institutions, between what American democracy "lives for" and the "institutions it lives by." * The *written* constitution embodies as fixed points, certain general propositions. These fixed points, however, have served only as points of departure in the forming of policies to carry forward a vigorous, expanding nation. At the same time, as actual policies have been put through by a never-ending process of political inclusion and exclusion, the relation of these policies to constitutional imperatives

* For an illuminating discussion of this point see E. S. Corwin, "The Constitution as Instrument and as Symbol," *The American Political Science Review*, XXX, 1071-1085.

As will be made clear in the remainder of this chapter and in Chapter II, it is impossible to examine fully the theory and practice of constitution-making in the United States without considering both the federal and the state influences.

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has been obscured. Interested parties have sought to demonstrate that the particular policies desired by them are covered *by the meaning of the written constitution itself*. The objective of such interested parties is, of course, to lend greater permanence to policies embodying their special interest. To achieve this objective, the widespread, generalized, emotional loyalty to "the Constitution" is appealed to for support.

There is no easy way for a given individual in American democracy to know when his deep-rooted emotional loyalty to "the Constitution" is being appealed to in support of some special interest. The Constitution of the United States is not readily divisible into "dignified parts" and "efficient parts," in the terms used by Walter Bagehot to characterize the English constitution.⁴ An examination of the constitutional system of the United States, rather than merely the *written* Constitution, does suggest, however, that these two "parts" are present. There are, actually, those parts which "excite and preserve the reverence of the population" and those "by which it, in fact, works and rules." Nevertheless, the ordinary individual is not accustomed to reacting to his government in these terms. The absence of institutions which are readily identified as "dignified" or "efficient" has led to confusion, in both thought and action, in operating the American political system. The bases of unity, which lie in the recognition of what is "above politics" and what is legitimately at the heart of politics, have suffered from this confusion.

Before the Constitution of the United States even existed, Tom Paine saw the necessity of dramatizing some basic element of our political system, in order "to excite

⁴ The English constitution, according to Bagehot, consisted of two parts: "first, those which excite and preserve the reverence of the population—the *dignified* parts . . . ; and next, the *efficient* parts—those by which it, in fact, works and rules" *The English Constitution*, and other political essays (Revised edition, New York: D. Appleton and Co., 1924), p. 72.

and preserve the reverence of our population." In 1776, he urged the calling of a "Continental Conference" for the purpose of drafting a "Charter of the United Colonies" under which the new continent might govern itself as a whole. As part of his argument, he makes the following remarks: "But where, say some, is the King of America? That we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the Charter: let it be brought forth placed on the Divine Law, the Word of God: let a crown be placed thereon, by which the world may know that so far we approve monarchy that in America the law is King."⁸ It may well be unfortunate that Paine's advice was not followed literally. Had such deliberate, man-made action been taken, an appropriate ceremony might have been fixed to an appropriate symbol.

In the absence of such action, however, a necessary and natural tendency of human beings to revere and to react emotionally to something higher than themselves has grown wild. The Constitution, at the same time that it was becoming a unifying symbol of loyalty and pride, became encrusted with diverse and particular "theologies." This indiscriminate "reverence" has kept the Constitution in constant danger of being appropriated to quite private use. Emotional loyalty has operated in an irrational context of dogmatic insistence on the "rightness" of one's own particular interest. The practices and institutions American democracy "lives by" are argued about as though they were the things it "lives for."

Perhaps no such simple act of dramatization as that suggested by Paine could have effectively distinguished the "efficient" from the "dignified" parts of our constitu-

⁸ Paine continues with this very interesting remark: "But lest any ill use should afterwards arise, let the Crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is." *The Writings of Thomas Paine*, collected and edited by Moncure Daniel Conway (New York: G. P. Putnam's Sons, 1894), I, 99.

tional system. The basic obstacle to achieving this end, through formally "crowning" the Constitution and declaring that "law is King," lies in the fact that the *dramatis personae* involved are all abstractions. Modern dictatorships were not the first to demonstrate that man likes to see his abstract loyalties embodied, at least approximately, in human form. This lesson is as old as the record of man's political and religious institutions. Nevertheless, American democracy early elevated itself to the level of formal dedication to abstract ideals. The difference between the American ideal of "law is King" and the English ideal that the "King is under the law" is striking and fundamental. The difference lies in the treatment given the human factor. "Law is King" is translated to read "a government of laws and not of men," which puts an abstraction to the fore. When this abstraction goes into action, however, it undergoes a humanizing retranslation. When human beings conduct the affairs of government, as perforce they must, this abstract principle is able to give only a limited account of what is happening. The principle that "the King is under the law" gives rise to less bewilderment. It makes clear that *men who would rule men* are subject to outside limitations, to prescribed general procedures. It is a more clear expression of the historic advance toward the circumscribing of personal power by prescriptions as to its exercise. It makes possible, moreover, a distinction between "dignified" and "efficient" parts of government. The general understanding of the principle of a "government of laws and not of men," however, has been confused as to the rôle of the human factor. Impersonal government has been mistaken to mean government which was run by abstract principles and not by human beings. This conception has obstructed realistic thinking by a self-governing people about the specific problems and responsibilities of self-government.

The struggle to render government immune, as far as

possible, from human limitations never ceases. The drive for self-government has been based upon the claim that the free exercise of man's capacities for rulership is the most ideal off-set to human limitations. The history of constitutional government in the United States, however, reveals an effort to *transcend* human limitations rather than to off-set them through responsible, self-governing institutions. Self-government has felt the lack of such institutions.

It is a commonplace [writes Professor Edward S. Corwin] that Constitutionalism has worked in this country to impress upon the discussion of public measures a legalistic—not to say theological—mold. By a terminology which treats *doctrines* as *facts*, the actualities which should control statesmanship have been too often kept at arm's length; while for the question of the beneficial *use* of the powers of government has been substituted the *question* of their *existence*.

Constitutionalism, he continues, included a dominantly negative attitude.

Indeed, it is astonishing the extent to which the taint of constitutional obliquity has always dogged the footsteps of the American people and their representatives^o

Judicial review became part of this pattern of constitu-

^o "The Constitution as Instrument and as Symbol," *loc. cit.*, p. 1077. The consequences of this negativism he itemizes further as follows: "The Constitution itself was unconstitutional by an argument to which Madison felt it necessary to reply in *The Federalist*. Most of Hamilton's legislative program was unconstitutional in the opinion of half of Washington's cabinet. The Louisiana Purchase was unconstitutional in the opinion of the President who accomplished it. The most important measure by which the slavery question was kept in abeyance for years was unconstitutional in the opinion of large numbers of people, and finally in the opinion of the Supreme Court. The Civil War was brought to a successful issue by resorting to measures which two out of three Americans alive at that time would have voted to be unconstitutional, and according to the *Democratic Almanac* of 1866, the Thirteenth Amendment was unconstitutional. And the enumeration might easily be prolonged to include almost every measure of scope and of somewhat novel character that the Congress of the United States has enacted within the last half-century." Pp. 1077-78.

tionalism and functioned in the service of the great monarch, King Law. The development referred to above as the obscuring of the relation between specific policies and general constitutional imperatives could not fail, however, to involve judicial review. This was, in fact, particularly marked in the period after the Civil War. Increasingly, the Law came to stand for the maintenance of certain existing social and economic arrangements, in the face of political pressures for change. In important instances these arrangements rested directly upon constitutional interpretation by the courts, rather than upon policies enacted into law by legislatures. As particular groups found their objectives frustrated, these groups directed an attack at the judicial personnel for multiplying limitations upon self-government by judicial fiat.

The relation of the human interpreters of the law to the law itself has given rise to disagreement among members of the judiciary as well as among interested parties. A particularly sharp controversy recently divided the Supreme Court. Did the Court merely "lay the article of the Constitution which is invoked beside the Statute which is challenged . . . to decide whether the latter squares with the former"; or was it their "own personal economic predilections" which determined the decision of the Court?⁷ Could it be said of the Court that "the only check upon our own exercise of power is our own sense of self-restraint"; or was such a statement "both ill considered and mischievous?"⁸ This controversy within

⁷ The latter statement was made by Justice Stone (in his dissenting opinion in *Morehead v. Tipaldo*, 298 U. S., this was the New York State minimum wage case, decided in 1936); the first statement is from the majority opinion of Justice Roberts in the case of *U. S. v. Butler* (297 U. S., the first AAA case, decided in 1936).

⁸ The first of these statements is from Justice Stone's dissenting opinion in *U. S. v. Butler* (cited in the preceding footnote). The rebuke is from Justice Sutherland's dissenting opinion in *West Coast Hotel Co. v. Parrish*, 300 U. S., 1937; in this case a Washington State minimum wage law was upheld and the precedent on which *Morehead v. Tipaldo* rested was

the Court itself could not but fan the fires of controversy in the more frankly political circles. As the area of dispute widened, it became evident that the "dignified" and the "efficient" parts of judicial review were getting in the way of each other.

American democracy may, symbolically speaking, have "crowned the Constitution," but it is the members of the Supreme Court who, in the popular view, wear the crown. Justices constantly proclaim their humility, their powerlessness in the face of the rigorous demands of the Constitution. They are, by their own declaration, only continuing the centuries-old Anglo-American tradition that all, rulers and ruled alike, are "under the law." Nevertheless, in the popular view they alone of the three branches of government are in a special way the guardians of "the law" and are, hence, "subject to it" in a qualified sense. The actual processes of judicial review are too technical to excite popular understanding and enthusiasm. No headlines were made when Justice Frankfurter observed that "the ultimate touchstone of constitutionality is the Constitution itself," not what is said about it by justices of the Supreme Court. On the other hand, the popular imagination can be excited by the pageantry of the "Supreme Court at work." Deep loyalties are touched as the "rule of law," the Constitution, is expressed through this human medium. The meaning of the Constitution for most persons is not gleaned from the more than three hundred volumes of technical opinions of the Supreme Court. The Constitution is an American epic, something never completely written down but passed on from generation to generation by word of pen and mouth, a mass of folkways, legends, celebrations, dreams. At the same time, popular belief has it that it *is* written down, that all this *could be read* in about twenty minutes, that its meaning is

overruled. This result was made possible by Justice Roberts, who joined with the four justices who had dissented in *Morehead v. Tipaldo*.

simple and unmistakable—and includes whatever *any reasonable person* knows is contained in a Constitution, as the Supreme Court says. The Constitution is something very personal, very practical, and yet very ideal. Anyone can understand it who understands what is *right*, and hence it is good to have a body of *right-thinking* men, not politicians, looking after it.

This mixture of the "dignified" and the "efficient" in the American constitutional system is the product of experience during a century and a half of independent self-government. As was pointed out above, divergent human tendencies have been at work. There is the urge both to personalize abstract ideals and to use them, to use them for particular individual, as well as for general social, purposes. The persistent tradition of denying the legitimacy, even the fact, of personalizing abstract ideals has both obscured and accentuated the use of these ideals for private purposes. It is said that we live under "a government of laws and not of men," but appointments to the Supreme Court inevitably reflect discriminating human choices as well as the desire to serve the abstract ideal. We say we have "separation of powers," but we do not pattern our behavior in scrupulous conformity to this principle; yet at the same time the principle is available as an instrument of attack by specific groups upon the objectives of other groups. Institutions, such as the Supreme Court and the Constitution, are exalted to a level "above politics," the better to protect some particular political interest. The bases of common loyalties are weakened by this confusing mixture of the "dignified" and the "efficient." The politics of self-government is handicapped by the failure to draw a sharper distinction between institutions and ideals.

The ordeal of self-government is to vindicate the claims it makes for the capacity of human beings to rise, despite human frailties, to a higher, more ideal mode of life. In

American democracy, the dilemma is that of reconciling the heavy burden placed upon the shoulders of human beings with the ideal that we shall "have a government of laws and not of men." The attempt to erect and operate self-sustaining human self-government means that there must be impersonal government, conducted by persons duly authorized to act in the name of the total body. The sheer audacity of such a conception of the destiny of man was enough to induce the search for outside help to justify it. It is not strange that "impersonal government" was translated, in part, into "non-human" government.

The search for techniques by which human self-government in the United States could avoid becoming mere personal government has presented no simple correlation between practical accomplishment and democratic ideals. On the one hand, there has been conducted a social experiment on a scale so vast and with an accomplishment so considerable as to rank high among the wonders of the world. A continental strip, comprising forty per cent of the area of North America and eighty per cent of its population, has been settled. More than that, the people and the resources of this strip have been continuously formed into a nation. Still more, these people and these resources have been continuously organized into a nation dedicated to self-government. This has meant not only the organizing of the largest single group on the largest single area ever to operate under self-government; more than that, it has meant receiving the people as they came, from all parts of the world, regardless of language, race or creed. The broad stream of the politics of self-government has been fed by the rivulets from a greater number of units of self-government than in any other country, as federalism and local "home rule" have been made to work. On this continent a new order of self-government has been struggling into being for a century and a half, and longer.

It would be too much to claim, on the other hand, that

human beings have accomplished this by undeviating adherence in detail to the high demands of democracy. Not all the rivulets have been pure. Much of the entirely personal, and even of the lawless, has played its part in the growth of the nation. Particular problems have been solved on a level more earthy than that of "a government of laws and not of men." The institutions of American democracy were not all on the blue-print in advance of actual experience, and some which were on it were passed by. Nevertheless, the broad stream of democratic politics has demonstrated a capacity for self-purification which is not to be overlooked, at a time when the opponents of self-government are urging their synthetic purifiers. It is not, therefore, too much to say that the abstract ideals of democracy, the vision men have had of a self-governing society, have played their important part in this process of democratic growth. Whatever the deviations from these ideals, under the stress of the immediate struggle, the nation has refused thus far to allow these deviations to be rationalized into a new political theory.

The importance of a viable relation between the "dignified" and the "efficient" factors in the American governing system is thus brought to the fore. How shall we bridge the gap between verbal conformity to abstract ideals and practical experience with functioning institutions? Shall we tag the former as hypocrisy, to be got rid of, or explain it away with some new psychological language? Or shall we go on describing our actual behavior as though it conformed to the abstract ideals, because it *ought* to do so? Or is there, perhaps, some *modus vivendi*, whereby the "institutions we live by" can be subjected to continuous, critical understanding and improvement so as to strengthen the emotional, intellectual and institutional bases of loyalty to the "things we live for"? In steering the latter course, the ideal and the actual must be kept simultaneously in view. It seems possible that the ordinary

practitioners of democracy, the politicians, have done no more harm to the ideals of democracy, in their deviations from the abstract ideal, than have those who prefer their private understanding of democracy's "absolutes" to the total experience of men engaged in the processes of self-government.

The success of American democracy hinges somewhat upon the race between man's capacity to solve new problems as they arise and his tendency to claim that all the solutions have been found. This is, of course, but another aspect of the conflict between man's creativeness and his dependence upon fixed principles. The necessity for constant development in the processes of self-government must be reconciled with the tendency to freeze the institutional *status quo*, under the guise of "fixed principles." Fixed principles there are and must be, yet allegiance to them must not obscure the basic fact that self-government is not something finished but is something growing and becoming. This fact can be obscured by the appropriation of fixed principles to private use, by treating doctrines as facts, by genuflecting excessively before the achievements of the past and thereby challenging the competence of new generations to govern themselves.

An outstanding example of treating doctrines as facts in such a way as to hamper a continuing capacity for self-government is to be found in the area of constitutions and constitution-making. Notable has been the tendency to "super-humanize" our ancestors and to "dehumanize" the problems of operating the institutions they bequeathed to us. This is in marked contrast to the attitudes of those early constitution-makers. The eyes of the Framers of the Constitution were upon the future. The very words and form in which they cast this basic document testify to their conviction that the arduous work of self-government lay before, not behind them. The most satisfied of the Framers would have been amazed to see their jerry-built

vehicle become the "carriage of State" it is today. At the conclusion of their work they had little thought of finality, of completeness. The Constitution was something to be used, so that these United States might develop into a stronger, a more vigorous, a more ideal nation—"to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. . . ."

The Constitution was to be used by men, in the pursuit of these high objectives. The dependence upon human judgment and human decision is made abundantly clear by the phrasing of the document.

The House of Representatives shall be composed of members chosen every second year by the people of the several States. . . . The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative. . . .

The executive power shall be vested in a President of the United States of America. Before he enter on the execution of his office he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States." The President shall be commander-in-chief of the army and navy of the United States . . . ; he may require the opinion, in writing, of the principal officer in each of the executive departments . . . (The) Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments. . . . He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. . . .

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of supreme and inferior courts, shall hold office during good behavior. . . .

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; . . . but no religious test shall ever be required as a qualification to any office or public trust under the United States.

The Congress shall have the power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

The Constitution was to be used by men, as it had been formed by men. "The atmosphere of the Convention," remarks Professor Corwin, "was . . . almost scandalously secular." The men at the Convention were "thoroughly imbued with the faith of their epoch in *the ability of the human reason, working in the light of experience*, to divert the unreflective course of events into beneficial channels; and in no respect did they deem man more evidently the master of his destiny than in that of statecraft."⁹ Concerning the human origin of the Constitution, Gouverneur Morris had this to say:

This paper has been the subject of infinite investigation, disputation, and declamation. While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe, that it was the work of plain honest men, and such, I think, it will appear.¹⁰

Viewing the results of the Convention in relation to the difficulties of its task, George Washington spoke hopefully:

The Constitution that is submitted is not free from imperfections, but there are as few radical defects in it as could well be expected,

⁹ *Loc. cit.*, p. 1073. Italics not in original.

¹⁰ *The Life of Gouverneur Morris* by Jared Sparks (Boston: Gray & Bowen, 1832), I, 290-291. The quoted remark was made in a letter "to a gentleman in France," written in January, 1788.

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considering the heterogeneous mass of which the Convention was composed and the diversity of interests that are to be attended to. As a Constitutional door is opened for future amendments and alterations, I think it would be wise in the people to accept what is offered to them. . . .¹¹

The Constitution was to be used by men. Its words are an eloquent, though simple, dedication to a faith in men, a faith that men under oath will cooperate in the service of their country and of all the people. To the remark that the men at the Convention had "made a good Constitution," Gouverneur Morris replied, "That depends on how it is construed." The belief that this new constitution would depend for its life on the men who used it is shown in the personnel who first applied it. The President, nearly half the Senators, and a large block of Representatives had been delegates to the Convention at Philadelphia. Only ten anti-Federalists had seats in the Senate and only two in the House. President Washington took care in the filling of appointive offices, whether of the Cabinet or the Supreme Court, to secure men whom he could trust to implement the words of the Constitution properly and wisely, according to the lights of his group. The sessions of the First Congress constituted but an extension of the Constitutional Convention, as words were translated, by men, into functioning institutions and policies.

We need to bear in mind [writes Professor McLaughlin] that the Constitution was actualized as a living fact by translation into tangible institutions. To comprehend now the importance of this early transmutation is not easy; but the fact is plain; every step taken, every principle announced or acted upon, was important in giving life to words; conduct was creative; practice and procedure soon became constitutional reality.¹²

¹¹ Letter to Col. David Humphreys, October 10, 1787. Quoted by Charles Warren, *The Making of the Constitution* (Boston: Little, Brown and Co., 1929), p. 735.

¹² *A Constitutional History of the United States* (New York: D. Appleton-Century Co., 1936), p. 225.

"Conduct was creative." So it was then and has continued. The real genius of the work of the Framers in 1787 lay in the "all-purpose" character of this tool of government they had outlined, the specific uses of which were to be discovered by succeeding generations.

The politics of self-government had put out new roots. Appropriately, the new pattern was delineated through the deliberations of a small group of men, claiming to represent the whole. Jefferson called attention, in 1789, to the importance of the constitutional convention as an example "of changing a constitution by assembling the wise men of the State, instead of assembling armies. . . ." ¹³ Since Jefferson's time, the constitutional convention has, indeed, become a symbol of government by deliberation, persuasion, and compromise. During this time, moreover, the processes of politics have become more complicated. As the base of the republic broadened into a fuller democracy, the web of politics became more intricate and extensive. The politics of self-government was putting out new roots continuously. Man's capacities and ingenuity were being taxed for the audacity of the claim that men could govern themselves. As democratic government, in fulfillment of the promise of its expressed ideals, made more direct contact with more of the people, the pattern of politics became a function of this fact. ¹⁴ All was not good nor according to plan; but neither was all bad. The principle

¹³ Letter from Paris to Col. David Humphreys, March 18, 1789. *The Writings of Thomas Jefferson*, collected and edited by Paul Leicester Ford (New York: G. P. Putnam's Sons, 1895), V, 89.

¹⁴ Issue might be taken with the reference to "democratic," rather than "republican," government during that early period. The present writers are of the opinion, however, that the term "democratic" is the more descriptive for their purposes, in view of the pressures (e. g., the growth of political parties, the extension of the suffrage, the increased activity and experience in politics) which were already at work on the "republican" structure of government set up in the written Constitution. Also, it seems valid, from the vantage point of twentieth century representative democracy, to disregard the eighteenth century definition of "democracy" as meaning *direct*, rather than *representative*, government.

of leadership by so-called "natural selection," so deep-rooted a part of eighteenth century rulership, gave way to a "free for all" jockeying for position. Along with "natural selection" went much of the social-political apparatus which had sustained it—inherited status in terms of social position, political influence, and techniques of maintenance.

The "free for all" society must needs construct its own apparatus, its own institutions and techniques for governing. New patterns of responsible action must be sold to the people by those who would govern. New forms of organized action flowed into the vacuum created by the preference of the Framers for indirect government. The momentarily superior organization of Federalists helped produce its natural counter-part, the opposition group. The "spoils system" sloughed off the still persisting aristocratic refinements, with resulting gains and losses for popular government. Political parties began to run to organization as such, in order to become holding companies for varied groups with incompatible as well as common interests. Political parties became flanked by and buttressed with ever-increasing groups of political opportunists, who sought to put on the pressure wherever it would do the most good for their particular objective. Terms such as "lobby" and "pressure group," and the distinction between "job politics" and "policy politics," indicate the growing ramifications of the democratic process. The web of politics became more intricate and extensive as the people and their governance came closer together.

The constitutional shoreline has changed with the ebb and flow of the tides of politics. No longer do the waters of politics lap gently or break violently over the Constitutional Convention of 1787. Today that convention seems to stand on a hill, remote from the water marks of politics. Legends have grown up about the supermen

(or were they demi-gods?) who wrought so remarkably in the dim past. At the same time, however, conduct has continued to be creative; practice and procedure have continued to become ever-renewing constitutional realities. American living, political and economic, has been flexible and adaptive. The very abundance of the problems to be solved has underscored Chief Justice John Marshall's insistence that the Constitution is not a legal code. Political mindedness and ingenuity have flourished under the challenge of self-government. The Supreme Court has become a symbol of government by law, but it has also been a continuing constitutional convention. The pervasive sense in which conduct is creative has been well-expressed by members of the Supreme Court. The late Justice Holmes, in the course of a Supreme Court opinion, remarked:

. . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago . . . we must consider what this country has become in deciding¹⁸

More recently, Chief Justice Hughes spoke in similar vein:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and out-

¹⁸ *Missouri v. Holland*, 252 U. S. 416, 433, 1920.

look of their time, would have placed upon them, the statement carries its own refutation. . . . The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution.¹⁶

American democracy has been creative in its practical development. A serious drag upon this creativeness in practice, however, has been the intellectual failure to keep pace with it, the failure of theory to explain it, to criticise it, and to relate it to the problems and ideals of democracy. Practice has forged ahead, while too often theory has either ignored new developments or has helped to freeze particular instruments of democratic government on the level of fixed principles. Democracy has suffered from an excess of professions of faith and from having what it is doing described in terms of that faith. Describing and interpreting actual human behavior has been considered less important than ascribing ideal value to that behavior. The facts of democratic life have been ignored or distorted by the politicians, the business leaders, the educators, as though faith in the democratic ideal might be weakened by too clear a view of democratic practice. Although democracy must have its unifying symbols and ideals, in the United States these have too often been used to conceal and even to deny the very processes of self-government. Certain of the instruments of self-government have become fixed on the level of unchanging symbols in such a way as to deny other equally necessary and actually existent instruments.

An outstanding illustration of our meaning here is to be found in the area of constitutions and constitution-making. No one today would describe the function and importance of the electoral college in terms of the original theories of the Framers, rather than in terms of the actual politics

¹⁶ *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 442-43, 1934.

of self-government which prevails. To an astonishing extent, however, constitutions and constitution-making are described in terms of abstract theories which find no place for the politics of self-government as it actually functions. The Constitutional Convention, we have noted, has become a symbol of government by deliberation, persuasion, and compromise. On the federal level, this development has been assisted by the fact that there has been but one such convention and that constitution-making has been dominated by the legalisms of the judicial process. On the state level, however, the constitutional convention has been a frequently recurring phenomenon. It is on this level, therefore, that the actual politics of constitution-making has been assimilated to an unrealistic verbal pattern. It is here that constitution-making must be considered in the light of what democracy and the politics of democracy have become. Such a consideration, however, runs counter to the whole pattern of "constitutionalism," in which the constitutional convention has become a symbol for a body of supermen, all-wise and non-political, operating in a social-political vacuum and capable of putting through a revolution by their deliberations.

CHAPTER II

CONSTITUTION-MAKING IN THEORY AND PRACTICE

The New York State Constitutional Convention of 1938 offered a specific opportunity to analyze democratic constitution-making in action. Since the concept of *constitution* has become a key abstraction in the political system of the United States, it is natural that the constitutional convention has been absorbed into this pattern of thinking. As a consequence, the actual processes of constitution-making have not been given the attention they warrant. The characteristics of the constitutional convention have been deduced from the idealized concept of *constitution* rather than derived from an analysis of the political processes of constitution-making. The constitution having been raised from the level of a functioning instrument to the position of a fixed embodiment of superior wisdom, the processes by which such wisdom was so enclosed were obscured. What is said about constitution-making gives no clear insight into the politics of democracy. A vital working relation between democratic theory and democratic practice is lacking.

Standard studies of state government offer too little that is descriptive and too much that is purely deductive in their treatment of the constitutional convention. The assumption that the work of the convention is more important than that of the ordinary legislature provides the basis for deducing certain conclusions; for example, that the quality of delegates is higher than in the case of members of the legislature, the public attention greater, the consideration more deliberate, and the issues settled on their merits. This tendency to resort to abstract conceptions rather than to empirical evidence in presenting the

constitutional convention is fraught with grave danger to democracy's understanding of itself. This is particularly true because the empirical evidence is often made to appear to bear out the abstractions.¹ Democracy today can preserve its ideals only by facing the facts, rather than by ignoring them. The actual workings of positive instruments of self-government are the carriers of the ideals and must, therefore, be viewed, analyzed, and criticized on this level.

Theories concerning the *fundamental* character of the constitutional convention have, consequently, tended to assume a consistency and detail which has not been compelled by observable practice. Its importance, however, as a unique political institution in the development of the United States is generally accepted. One writer, applying a baldly pragmatic test, asserts that the survival of the convention is proof of its fitness.² Nevertheless, the fact

¹ A representative selection of standard studies would include the following: Bromage, Arthur W., *State Government and Administration in the United States* (Harper & Bros., 1936), Crawford, Finla G., *State Government* (Henry Holt & Co., 1931), Dodd, Walter F., *State Government* (Century Co., 1922); Graves, W. Brooke, *American State Government* (D. C. Heath & Co., Revised edition, 1941), Holcombe, Arthur N., *State Government in the United States* (Macmillan, Third edition, 1931); MacDonald, Austin F., *American State Government* (Thomas Y. Crowell Co., 1934), Mathews, John M., *American State Government* (Appleton-Century, rev. ed., 1934). W. Brooke Graves (in his 1941 edition) calls attention to the fact that virtually nothing has been written on the influence of pressure groups and propagandist methods at constitutional conventions. "It appears, in fact," he writes, "to have been assumed that the members of conventions are in some way drawn from a different species than that from which the members of other lawmaking bodies are selected, and that they function in another sphere, quite remote from the mundane influence of political parties, lobbies and pressure groups. Such clearly is not the case." *Ibid.*, p. 93.

² Holcombe, Arthur N., *op. cit.*, p. 520.

There have been some two hundred conventions in the course of our history, even though twelve state constitutions do not provide for them, one state with such a constitutional provision has had none, and the experiment with a federal convention has not been repeated. Legislatures have, in some cases, however, resorted to amendment by convention without express constitutional provision therefor.

of survival affords no clue to the processes by which the constitutional convention became an established institution of government.

The constitutional convention, historically, was a product of necessity and of new responsibilities. It was constructed from materials at hand, both theoretical and practical. Although it was indigenous, it was not universal, either in the early period or since. During the first eight years of national independence, constitutions were established by diverse procedures. In three states, constitutions were provided by the legislative bodies, without express authorization and without submission to the "people" (that is, the then existing electorate). In five states, constitutions were drafted by legislative bodies expressly authorized to perform this function, but were not submitted to the electorate. In four states, this same procedure was followed, with "informal" submission to the electorate in three cases, and "formal" submission in one. Deliberations on new constitutions were re-opened in several states during this period by specially chosen bodies which subsequently submitted proposals to "popular" vote.*

Constitution-making and its techniques were in their infancy at that early date. This was true in the matter of constitution amending, as it was in the drafting of constitutions. So little attention was given to the problem of amending that it is fruitless to turn to this area for positive evidence in support of any particular theory of constitutions and constitution-making. Of the "revolutionary constitutions," six, including that of New York State, made no provision for amendment, and three made provision for amendment by the legislature. Of the constitu-

* See any of the standard studies cited above. Professor Walter F. Dodd concludes that by 1784 the constitutional convention was firmly settled as a body apart from the regular legislature, *although it was not much used until later*. In other words, where the convention was being used, its characteristics were taking definite shape. However this may be, the "constitutional" traditions and attitudes did not form so rapidly.

tions of this period which continued after 1784, four, including that of New York State, were without provision for amendment, and three others lodged this function in the hands of the legislature.

Since these modest, trial-and-error beginnings of constitution-making, a wealth of experience has accumulated. Constitutional conventions have operated within a framework of more clearly defined legal rules and functioning political institutions. Considerable controversy has been stirred up over such questions as the "legal power" of the constitutional convention. One of the earliest treatises on the convention was written by Judge John Alexander Jameson. It was written to refute what he considered to be the dangerous, as well as exaggerated, claims made during the Civil War period that a convention was possessed of "absolute sovereignty." He found, to his satisfaction, that while the convention had started as a revolutionary body, it had since been domesticated and had lost these extreme powers.⁴ This legalistic thesis, scholarly though the investigation was, did not go unchallenged. Roger Sherman Hoar rejected this theoretical limitation in his study of the subject.⁵ Professor Walter F. Dodd asserts that, while several conventions have advanced the theory of "absolute sovereignty," none has acted on it.⁶ Controversy has persisted over Judge Jameson's effort to cut the facts of history to fit his legalistic theory. The

⁴ *A Treatise on Constitutional Conventions; their History, Powers and Modes of Proceeding*. (The edition used was the fourth, Callaghan & Co., 1887.)

⁵ *Constitutional Conventions, Their Nature, Powers and Limitations* (Little, Brown Co., 1917). This book was written, in anticipation of a constitutional convention to be held by the State of Massachusetts, by one of its veteran politicians.

⁶ *Revision and Amendment of State Constitutions* (Johns Hopkins University Press, 1910). Despite some traces of the conventional stereotypes, this book is one of the most empirical studies which has appeared on the subject. Its approach is, however, formal and legalistic, not sociopolitical.

argument should serve, at least, as a warning against wresting the constitutional convention out of the situation and forces of which it is a function, and assimilating it to some special political theory and purpose. Whatever the legal powers of the constitutional convention, the empirical evidence on its peace-time operations makes it clear that any convention functions within very effective *practical* limitations. These limitations can be discerned by a study of the political forces and institutions which operate at the time of the convention. The notion that a politically organized society becomes a *tabula rasa* upon which a constitutional convention may write whatever may come to the minds of its delegates is scarcely a credible one.

What a constitutional convention is and what it does becomes, therefore, a matter for analytical, historical exploration. The first convention held in the State of New York, in 1777, was a truly revolutionary government. While it functioned, it exercised all the powers of government. The constitution which it drafted went into effect at once, without popular ratification. The convention used its "powers" even to the point of selecting the representatives for the new government from some districts, without regard to the provisions of the new constitution. The limitations upon that convention were those set by necessity and by the judgment and the predilections of the delegates. A comparison of the First with the Eighth, the 1938, Convention from the point of view of limitations will be undertaken later in this study. We need suggest here only a few of the limiting factors, namely: the constitutional tradition which any convention inherits; the resistance of the major political parties to further political experimentation in forms and techniques of government; the insistence of pressure groups in the pursuit of their particular objectives; the difficulty of discovering just what a convention may and can do.

Aside from the legalistic arguments mentioned above,

concerning the legal power of the constitutional convention, its character and importance have been largely deduced from the concept of "fundamental law."⁷ It has become customary to speak of a constitution as fundamental law. Precisely what it is which makes it fundamental law, however, is attended by much confusion. Is it the fact that the "people," in the fullness of their sovereign power, have established it? Or is it that certain principles and practices of government are *inherently fundamental*, that is, *constitutional*? Is it that matters are in the constitution because they are fundamental, rather than fundamental because they are to be found in the constitution? What are the criteria of inherently fundamental and how are they discovered? Do they stem from a *higher or natural law*, or simply from practical considerations, such as the desirability of avoiding the rigidity resulting from too much detail in a written constitution?⁸

The material of standard studies on state constitutions offers little help in answering these questions. Confronted with the fact that state constitutions have become accumu-

⁷ To trace this concept to all its many sources would take us too far from our major task. A study of the many forces which have contributed to it would reveal the interesting process by which a concept takes on ambiguous content, while at the same time it is cut off from its origin in specific facts and institutions. We must content ourselves with brief reference to a few of these sources, namely, the broader base of democracy in an expanded suffrage, the influence of "judicial review," and the writings of commentators and text-book authors.

⁸ Too little analytical attention has been given, in the discussion of state constitutions and constitution-making, to the extent to which the rivulets of state constitutional law are tributaries to the main stream of thinking about our federal constitutional system, of which the fountain-head is the federal constitution and judicial review. Pertinent material, however, for suggesting the complex pattern of inter-related factors is presented in various writings of Professor Edward S. Corwin. Cf. particularly "The 'Higher Law' Background of American Constitutional Law" (42 *Harvard Law Review*, 1928-29); "The Basic Doctrine of American Constitutional Law" (12 *Michigan Law Review*, 1914); "The Doctrine of Due Process of Law Before the Civil War" (24 *Harvard Law Review*, 1911); *The Twilight of the Supreme Court* (Yale University Press, 1934).

lations of miscellaneous detail these studies resort to verbal categories to indicate that much that goes into the so-called fundamental law is not "fundamental." Distinctions are made between constitution in the *material* and in the *formal* sense, or between *merely statutory law* and *truly constituent law*. The criteria by which these distinctions are made, however, remain obscure. Moreover, the historical correlation between the increased popular control over constitution-making and the increasingly detailed character of state constitutions is not given its proper weight. This situation suggests, therefore, that the thinking about constitutions and constitution-making rests more on unanalytical acceptance of inherited abstract concepts than on a study of the actual processes of democracy.

The constitutional convention is held, by many, to be the highest order of legislative body, or the supreme representative body of a free people.⁹ If this be true, why is the distinction between *mere statute* and *fundamental law* a constant, though largely unanalyzed, thread of criticism? Why is the distinction applied less rigorously to the earlier *and less democratic* constitutions? Why is this problem disposed of by reference to generalized abstract principles, instead of by an analysis of concrete instances in terms of the facts, the motivations, and the results? The answers to these questions would seem to lie in a more direct and more vital reconciliation of "constitution as fundamental law" with "constitution-making as the direct expression of the popular will."

The failure to achieve this adjustment lies at the very heart of American constitutional development and the thinking about it. The concept of fundamental law has served as a holding company for two lines of development, two lines which have run at times parallel, at times

⁹ Cf. Dodd, W. F., *op. cit.*; Jameson, J. A., *op. cit.*; also, the monumental work by Charles Z. Lincoln, *The Constitutional History of New York* (Rochester, N. Y.: Lawyers Co-operative Publishing Co., 1906, 4 vols.).

more or less in coincidence, and at times quite in divergence. We may call these the development and operation of judicial review and the consolidation of popular sovereignty for more direct action. Much that professes to be a discussion of the *fundamental law* from the point of view of the legislated will of the sovereign people (through popular constitution-making) is, in actual fact, a discussion of fundamental law in the terms used by courts. The characteristics of constitutions and constitutional conventions are deduced from judicial theory or derived from judicial concepts.

Many of the terms commonly associated today with democracy were current in the earlier historical periods, but carried somewhat different meanings. A specious historical continuity is implied because of the appearance in the eighteenth century of verbal symbols which persist in twentieth century democracy. The first constitution of the State of New York illustrates this point. That constitution was drafted by a convention which represented neither all the people nor all the area ~~for~~ which it spoke; it was adopted with about one-fourth the membership of the convention present during the discussion and the voting; it provided for a restricted electorate; and it went into effect at once, without popular ratification. Nevertheless, this constitution contains the following statement, in the words of the political theory current at the time: "This convention, therefore, in the name and by the authority of the good people of this state, DOTH ORDAIN, DETERMINE, AND DECLARE, That no authority shall, on any pretense whatever, be exercised over the people or members of this state, but such as shall be derived from and granted by them."¹⁰ The "consent of the governed," as Professor Bromage has pointed out, was an

¹⁰ This statement was dropped by the first convention to be elected on a broader suffrage, in 1821. The Convention of 1821 exhibited considerable scepticism of the earlier political theory, as we point out below.

constitutions were cast which most writers appear to have in mind when they speak of the distinction between fundamental law and ordinary legislation. The superficially apparent quality of changelessness of the federal constitution and the fictions through which judicial review operates have done much to perpetuate this notion.

The paradox of state constitutional law, however, is that the "people" have made short work of the notion that a constitution should be only a generally-stated enabling act. At the same time they have given their support, in a difficult amending process, to the honorific abstractions, "constitution" and "fundamental law." They converted the constitution into an instrument of popular self-government, but shrank from the full implications and responsibility implicit in their action. The result was the joining of the idea of a constitution as a limitation upon power with the idea of constitution as an embodiment of policy-making legislation by the people. The attitude toward the constitution, as symbol, was preserved, while the practice of constitution-making played fast and loose with it.

It is no criticism of American democracy to observe that its institutions did not spring full-bodied from any theory. Institutions have resulted, rather, from a continuing process of construction by a society of human beings formally committed to self-government. The understanding of this process has been obscured by the fact that the political theory of the period outran institutions. The early political theory made no provision for a developmental period, in which the institutions established would reflect the current conditions and attitudes rather than any *simon-pure* theory. Our analysis of the theory and practice of constitution-making requires, therefore, some further consideration of that early period when constitutions were being converted into positive instruments of popular self-government.

We have suggested that the supposed practice of constitution-making has been deduced too much from abstract theory, rather than derived from empirical data. Let us, then, examine the theory and practice of constitution-making as it developed, historically, in New York State.¹³

The first Constitution of New York State, adopted in 1777, functioned for forty-five years virtually unchanged.¹⁴ During this period, in fact, there was no regularized procedure for amendment provided by the constitution. Moreover, as Mr. Lincoln remarks, the constitution itself "received little judicial attention."¹⁵ This first constitution was brief, and restricted in scope. Its brevity stemmed in part, as Mr. Lincoln notes, from the fact that "many subjects now deemed important were omitted." Equally important, however, was the fact that implicit limitations upon the exercise of power were contained in the provisions for restricted suffrage and few elective offices. In other words, the constitution was primarily an organization of governmental powers and institutions to be operated by a restricted group. The significance of the limited governing group as an explanation of the brevity of the constitution has been overlooked. It seems to have been overlooked by Mr. Lincoln, although he refers to the fallacy of John Jay's maxim that "'those who own the

¹³ The material for this discussion is drawn largely from the following sources: the official *Record* of New York State constitutional conventions; *The History of the State of New York*, edited by Alexander Flick (Columbia University Press, 1933-1937, 10 volumes); the monumental work of Charles Z. Lincoln, cited above. One of the reasons for extensive use of this latter source is that it contains both an extensive record of New York State constitution-making and also the use of many of the general principles and abstract concepts which we are attempting to isolate for purposes of examination.

¹⁴ See above, Ch. II, pp. 24 and 26, for references to New York State's first experiences with constitution-making.

¹⁵ For a discussion of the first constitution see Lincoln, Vol. I, Chapter II. For later conventions see Vols. II and III.

country ought to govern it,' " which was at the base of the property qualifications established in the first constitution.¹⁶ In Mr. Lincoln's discussion there is the confused mixture, to which we have been calling attention, of an abstract ideal of *fundamental law* and of the political forces and motivation which lie at the roots of a constitution. In the confusion, analysis and description come off second best.

The simple brevity, the "unsuspecting simplicity" [he writes] of the first Constitution is in striking contrast to the prolixity of some modern constitutions, which evince a misapprehension of the real purpose of a written constitution, namely, to state principles of government in general terms, and not with the fluctuating detail necessarily incident to statutes intended to meet shifting conditions of society or administration.

Compare this idealizing of the first constitution with the following remarks concerning the motivation of its framers:

The Jays, the Livingstons, the Morrisises, the Clintons, the Gansevoorts, the Schuylers, the Van Cortlandts, the Van Rensselaers, the Roosevelts, the Spencers, the Lansings, the Lewises, the Ten Broecks, Duane, Scott, Kent, Hamilton, Tompkins, Burr and others who constructed, set in motion, and maintained this simple machinery of government, did not need elaborate descriptions or limitations of power. They had a Constitution which gave them the right of self-government, and they knew how to use the right judiciously. . . . The Constitution was sufficient for their needs.

¹⁶ Of the framing of the first constitution and Jay's part in it, Lincoln makes this remark. "Neither was it framed by experienced men of mature years, but by young men reared in luxury, and who had not enjoyed the opportunities of public service and acquaintance with details of public affairs. John Jay, who is understood to have been the chief author of the Constitution was only thirty years of age, Robert R. Livingston, one of his colleagues, was only twenty-nine, and Gouverneur Morris, the other, was only twenty-four, when they were appointed on the committee to frame a form of government; yet these wise young patriots exercised a controlling influence in preparing a Constitution which was the fundamental law of the state for forty-five years. . . ." I, 471.

*They were almost wholly unrestrained, for it will be noted that the restrictions in the first Constitution related chiefly to immaterial subjects which soon became obsolete. They did not need to tie their own hands, for they could trust themselves.*¹⁷

Despite this very favorable opinion of the work done by these people in equipping themselves for "self-government," Mr. Lincoln does make one criticism. "They did not," he asserts, "seem to appreciate fully the importance of a clear separation of the powers of the three great departments into which the government was divided." The theory of separation of powers, so important to the development of judicial review as a limitation upon governmental power, was not important to those who "could trust themselves."

This first constitution made no claims to theoretical completeness.¹⁸ Its primary objective was to establish a functioning government. Executive and legislative branches were necessary to the operation of an "independent" state. These were provided in accordance with the then existing ideas of *representative government*. The existing judicial organization was continued, along with the "law of the colony," including the common law and the statutes of England, existing on April 19, 1775. No special category of what has come to be called the Bill of Rights was included. Special mention was made only of freedom of religious faith and worship, trial by jury, and the prohibition on bills of attainder.

Mid-way in the life of this first constitution there arose an interesting situation which has a high relevance to our problem. A constitutional convention was called for the purpose of construing an article of the constitution. Article 23 provided for a "council of appointment," a body

¹⁷ *Op. cit.*, p. 594. Italics not in original.

¹⁸ Cf. the remark of Professor Bromage to the effect that constitutional conventions have not tried to draw up the theoretically perfect constitution. *Op. cit.*, p. 88.

of considerable importance in view of the small number of elective offices.¹⁹ By 1801 a political deadlock had brought the operation of this institution to a standstill, while important appointments clamored for attention. In 1796, Governor John Jay²⁰ referred to the situation in his message to the legislature and asked that body to consider the desirability of resolving the dispute by declaratory act.²¹ The matter was shunted around by the two houses of the legislature. Finally, the legislature declared it had no power to make a binding construction of the disputed provision. Mr. Lincoln cites evidence that Jay sought to get a judicial construction of the article, "which they unanimously declined giving, on the ground that the expression of an opinion by them was not within the scope of their official duties, but entirely extra-judicial."

The deadlock was broken by the legislature by calling a convention to settle the issue. Thus, there had arisen a heavily charged political situation which a convention was called upon to resolve by simply declaring the meaning of an existing provision; or, more realistically stated, by giving it such meaning as it chose. The electorate was given no opportunity to register a choice in the matter. The legislature simply called for an election of delegates.

¹⁹ This council was set up annually by the assembly and consisted of one senator from each of the four "great" districts, together with the governor, acting as president. The article declared that the governor, "with the advice and consent of the said council, shall appoint all the said officers."

²⁰ Jay was elected governor of New York while he was abroad as an envoy of the United States and was at the same time Chief Justice of the Supreme Court of the United States. He resigned the latter position after his election to the governorship.

²¹ Governor Jay's construction of Article 23 was that the sole power to nominate lay in the governor, while the senators could accept or reject. The Senate held, however, that the Council acted as a body, with power to nominate included in the "advice and consent" of the senator-members. It appears, also, that political differences had arisen, with members of the governor's party being rejected by the council.

Moreover, the decision of the convention, which sat only two weeks, was not submitted to popular approval. The constitutional convention, based upon a restricted electorate, remained a device which was only indirectly related to the full expression of the "popular will." This convention did, however, perform the function of breaking a deadlock within the government.

In view of some of the stereotyped attitudes toward constitutional conventions, it is worth noting that conventions were not "above politics" even before they became more thoroughly democratic. The issue of the Council of Appointment was resolved against the interpretation of Jay, although he had been one of the sponsors of that institution in the first convention. Mr. Lincoln, in his discussion of the issue, deplores this disposition of the dispute. The large vote by which it was carried, he asserts, "is explained by the fact that each of the two great political parties of that day had committed itself in favor of nominations by the members of the council." To him this construction was the death knell of what might have been a valuable, "permanent" institution, one which could have been "above politics" in the joint responsibility of assembly, senate, and governor for good appointments. But "in the partisan struggle for power at the beginning of the last century the opinions of the authors of the Constitution seem to have been overlooked or ignored. Under the construction given by this Convention the council became a powerful and sometimes a very objectionable political machine, and at the time of its abolition, twenty-one years later, it wielded a patronage including nearly 15,000 officers, with an aggregate salary list of one million dollars. It often dispensed patronage with a high hand. . . ." ²²

²² *Op. cit.*, I, 611. This is another interesting example of Lincoln's faith in the work of the founders, a faith which credited them with a wisdom sufficient to keep "politics" out of government by the sheer

The "partisan struggle for power" showed no signs of abating, however, and "politics" continued to invade the domain of representative government. The Constitutional Convention in 1821 undertook, for the first time in forty-four years, a wholesale reconsideration of the constitution. By the time the stage was set for this undertaking, two "non-political," indirectly established, institutions were marked for destruction. The Council of Revision and the Council of Appointment were abolished at the 1821 Convention by unanimous vote, and without prior discussion on the floor of the convention. Both councils had become mired in the politics of representative government.²³

The Convention of 1821 might be considered more typical of what the constitutional convention has become than was that of 1777. It was a function of a period in which conditions were more settled. Also, the slogans of representative government were being brought into closer relation with the positive problems of institutionalizing existing domestic forces. The most important items on the agenda of the convention were set by the forces which brought the convention into being. More than that, the disposition of these items by the convention was to a large

force of institutions. The "original creativeness" of the framers rather than analysis of subsequent experience was his touchstone

²³ The enormous power of patronage available to the Council of Appointment had made this body the focus of political activity. Moreover, because the council was elected by the assembly, the latter body was heavily involved. The function of assemblymen as electors of the council often outweighed other considerations, particularly in election campaigns. Both the Governor and the Assembly took cognizance of this fact in recommending a constitutional convention.

The Council of Revision was similarly involved in politics. The lodging of the power of "revision and consideration" of all legislation, subject to power in the legislature to override by a two-thirds vote of each house, in a council composed of the governor, the chancellor, and the judges of the supreme court had been censured by the Assembly. According to its declaration, "the body in which this power is vested ought, at stated periods, to be answerable to the people for a faithful and judicious exercise of it."

extent pre-determined by those same forces. Hence, the discretion of the delegates and the effective power of the convention was limited. In recognition of these facts, the legislature made the popular base of this convention broader than its own. It also provided that the product of the convention was to go to the same electorate for approval. This convention, then, marks an important step in the direction of subordinating the legislature to the convention, although the process was not completed for three-quarters of a century. *The subordination, however, lay primarily in the recognition of the independent power of the "people" to amend and revise through the convention; it did not lie in the character of the work to be done by the convention, such as the "greater importance" of the work, the "higher quality" of the delegates, or the distinction between "ordinary" and "constituent" legislation.*

In the absence of any regularized procedure for amending the constitution, how did the Convention of 1821 come about? There was agitation for constitutional changes as early, at least, as 1811. In that year both houses of the legislature devoted considerable discussion to this matter. Proposals were entertained concerning the reduction of property qualifications, the extension of the elective principle, and the curbing of the Council of Appointment. In this same year there were instances of popular petitions favoring a constitutional convention to consider the removal of property qualifications. Again in 1818 and 1819 the legislative bodies showed their awareness of popular feeling. The net result, however, was the shunting of the problem in and out of committee, without taking favorable action. During the early part of 1820, a convention was recommended both by Governor Clinton and by a committee of the assembly.²⁴ In its report this committee made the following statement:

²⁴ It is of interest to note that twenty years earlier Clinton, as a

Your committee, on this occasion, cannot forbear to remark that, whilst they witness in our sister states generally a disposition to embrace the opportunity presented in the present favorable state of our affairs as a nation, of introducing such wise and salutary measures of improvement as the times seem peculiarly favorable for carrying into effect, in this state, unfortunately, *though a like disposition is ardently appreciated by a great part of the community*, our energies are almost rendered nugatory by our division into distinct and contentious political parties, on subjects the most trivial and unimportant. Your committee are decidedly of opinion that this evil is attributable, in a great measure, to the defects in our state Constitution. . . .²⁵

The committee recommended a convention to consider the councils of revision and of appointment, and the suffrage. A bill embodying these recommendations failed, however, to pass either house.

The issue of constitutional revision was not yet out of the political woods. In November Governor Clinton again stressed the urgent need for a constitutional convention. He suggested that legislative disagreement might be surmounted "either by submitting the subject of amendments generally to a convention, and thereby avoiding controversy about the purposes for which it is called, or by submitting the question to the people in the first instance, to determine whether one ought to be convened. . . ." In either case the results were to be submitted to the electorate. On November 20, 1820, the legislature passed a bill following the precedent of 1801; that is, it provided for the election of delegates rather than for submitting the issue of a convention to the electorate. On the same day, the Council of Revision vetoed the bill, with the four judicial members divided evenly and Governor Clinton making the veto effective. The veto rested on two

senatorial member of the Council of Appointment, had worked actively for the interpretation which subordinated the governor to the Council. This was now his chief reason for recommending a convention.

²⁵ Quoted in Lincoln, *op. cit.*, I, 619. Italics not in original.

grounds: first, that the electorate was not allowed to vote on the question of having a convention; second, that the bill provided for submitting the constitution as a whole to the electorate, allowing no discrimination among different parts.²⁶

Although Chancellor Kent had voted to sustain the bill, he now wrote the opinion stating the reasons for the veto. In a highly interesting appeal to "fundamental concepts," he challenged the power of the legislature to launch a re-consideration of the constitution without express authorization by the "will of the people." Because of the grave nature of any move toward amending the constitution, he argued, the presumption was against the people's desiring it until this presumption was reversed by their express declaration. His thoughts on constitution-making are well indicated in the following excerpt from his opinion.

There can be no doubt of the great and fundamental truth, that all free governments are founded on the authority of the people, and that they have at all times an indefeasible right to alter and reform the same as to their wisdom shall seem meet. The Constitution is the will of the people, expressed in their original charter, and intended for the permanent protection and happiness of them and their posterity, and it is perfectly consonant to the republican theory, and to the declared sense and practice of this country, that it cannot be altered or changed in any degree without the expression of the same original will. . . . But . . . the measure recommended by the present bill is not confined to any specific object of alteration or revisal, but submits the whole constitutional charter, with all its powers and provisions, however venerable they may have become by time, and valuable by experience, to unlimited revisal. The council have no evidence before them, nor does any legitimate and authentic evidence exist, that the people of this state think it either wise or expedient that the

²⁶ This opinion did not prevent the convention itself from adopting this form of submission. As we shall see, this was one of the controversial issues in 1938.

entire Constitution should be revised and probed, and perhaps disturbed to its foundation. . . .²⁷

From the point of view of the actual origins of the New York State constitution, and of the "practice of this country," or even of the evidences of a general desire of the people of the state for a constitutional convention, Chancellor Kent's argument stands out as a factually dubious appeal to abstractions for conservative purposes. The move to give the unorganized citizens direct access to constitution-making was opposed in the name of the "people."

The action of the Council of Revision was vigorously attacked by a committee of the assembly. The Council was charged with having ignored the prolonged popular agitation for revision. More seriously, it was charged with having, in effect, elevated itself to the position of a third branch of the legislature. The necessary two-thirds vote was not mustered, however, so the action of the Council stood. Finally, on March 13, 1821, favorable action was taken, and a law was passed providing for the submission in April of the question of a convention. If the vote were favorable, delegates were to be elected in June. The qualified electorate was enlarged to include all tax-payers and those rendering certain kinds of labor in the public service. In April the convention question carried by a vote of 109,346 to 34,901, with all but six of the fifty counties favoring the convention. Thus, after much political pulling and hauling, the "people" in a more substantial sense than heretofore undertook the revision of their *fundamental law*.

²⁷ *Reports of the Proceedings and Debates of the Convention of 1821* (Albany, 1821), Appendix, p. 677. Indicative further of Chancellor Kent's rather fearful attitude toward the convention is a remark which he made, as a delegate, on the floor of that convention: "We are engaged in the bold and hazardous *experiment* of remodeling the constitution" *Ibid.*, p. 220 (italics not in original).

The Convention of 1821 re-organized and re-wrote the entire constitution in the course of two and one-half months. This work was done by a group dominated by farmers, with a representation of sixty-eight members out of a total of 126. The second largest group consisted of lawyers and judges, of whom there were thirty-seven. The main problems before the convention were those concerning the councils of appointment and revision, and the extension of the suffrage, all of which had been clearly outlined in the popular agitation for a convention. This fact was fully recognized by the delegates and revealed in the debates. Mr. Lincoln observes that "The Convention seemed to be pervaded with a sincere desire to make a constitution which should express *in outline* the policy of the state concerning public affairs and administration, *so far as that policy needed to be enlarged or limited by the fundamental law.*"²⁸ The resulting constitution was considerably longer and more detailed than the previous one, although far shorter than it has since become. The detail which went into or was kept out of the constitution was determined by a political process of inclusion and exclusion as debates proceeded on particular problems. Was there a sense in which this represented the application of an abstract principle?

The debates show that the idea that a particular matter "should be left to the legislature, because such detail should not go into the constitution" recurred frequently *as an instrument of argument*. In some cases, these debates involved subjects which today are perhaps viewed as "inherently constitutional," such as the bill of rights, voting by ballot, and the suffrage. The debate on the bill of rights revealed the attitude that such rights were safer in the written constitution, without regard to evidence as to whether their existing statutory expression was effective.

²⁸ *Op. cit.*, I, 637. (Italics not in original.)

After a day of argument, marked by disagreement among the judges and lawyers on the technicalities involved, one delegate moved that further consideration "be postponed until 1st January" (that is, indefinitely).

"If . . .," he declared, "the talents of the judiciary cannot agree on a bill of rights; how shall we simple yeomanry be able to pronounce upon the great abstract points of jurisprudence, which are so interesting to the community at large? . . . I am unwilling to put it in the hands of the people of the state, to form an opinion on this subject, lest they may cheat themselves."²⁹

Chief Justice Spencer agreed with him, stating that in his opinion, "a bill of rights was superfluous, owing to the general understanding, in this community, of their rights. . . ." The chairman of the committee reporting the matter disagreed, saying in part:

"A bill of rights setting forth the fundamental provisions of our government, has always been held sacred, and I have seen . . . the utility of this bill of rights, which serves as a standard, easily referred to on all constitutional questions. one calculated to restrain useless and improvident legislation."³⁰

The convention ended by yielding to the appeal of constitutional symbolism. It wrote into the constitution certain of the features of the Bill of Rights Act of the legislature which had been passed in 1787.

One reason why a constitution gathers detail is seen in this episode. The belief in the effectiveness of the constitution as a sacred symbol triumphed. In the matters of voting by ballot and of the suffrage, however, analysis reveals a different story. The appeal against putting the detail into the constitution was a function simply of opposition to the particular provisions under discussion. In the case of voting by ballot, it was argued that experience had shown the worth of this manner of voting, so that

²⁹ *Record, op. cit.*, p. 171.

³⁰ *Ibid.*, p. 163.

existing legislative discretion should be withdrawn. This was countered, however, by an attack upon the abuse of the ballot by political party control of the printing, and by a plea to leave the matter to the legislature. The argument from experience *versus* legislative discretion concluded with the following exasperated outburst, as reported in the record:

Mr. Cramer thought gentlemen were too prone to find fault . . . one day, all confidence is required for the legislature; on another, the legislature is denounced as corrupt and unfit to be trusted. The gentleman from New York . . . who wants to do things at a stroke, is for leaving the whole to the legislators; I am not, sir. The time has been, and may again come, when the legislature will be actuated by corrupt views. I would never, therefore leave it to the legislature to pass upon this important provision; the right of voting by ballot should be secured by the constitution, so that no future law may ever authorize viva voce voting for governors or high officers.²¹

The matter was voted into the constitution. ~

Another illuminating instance of embodying existing, detailed legislation in the constitution occurred. Certain sources of revenue were tied to the payment of financial obligations incurred or to be incurred in the construction of canals. The development of waterway transportation was a dominant enterprise, which had been hailed as a great economic boon to the state. The convention sought, however, to "secure the credit of the state" by fixing in the constitution the toll and tax rates already established by legislative action during the preceding few years. This action precipitated a sectional controversy. The western delegates denounced the proposal as discriminatory, charging that the salt tax in question fell upon the western part of the state, and that it placed in the constitution a subject which should be left to the legislature.

²¹ *Ibid.*, p. 206.

But it is unreasonable and unjust [argued one of the western delegates] that the Convention should legislate for posterity, or for any particular portion of this state. The subjects, of taxation ought in his opinion, to be left to the discretion of future legislatures, whose dignity and honor would never permit them to act contrary to public faith or public good.³²

When this argument was lost, the same delegate led and won a fight to fix other tax rates in the constitution. In this instance, the prevailing arguments cast doubt on the capacity of the legislature and the political parties to resist making an issue of these ear-marked taxes, particularly as the population of the interested section of the state was visualized as increasing until their numbers enabled them to slide out from under their financial obligations. The recognition of the force of local interests and the insistence upon removing this matter from the sphere of the legislature was most effectively stated by another of the western delegates, whose argument ran as follows:

But it was a question touching the local interests of large bodies of people; the temptation to regard only those interests was a strong one, and the subject was one on which they were always liable to be excited and agitated by designing and ambitious men. It was a spirit, which, whenever awakened, could not be resisted, even by those more considerate amongst them who thought it unwise. In all future struggles of parties, it was to be feared if this question was left open, that rival factions would ever resort to it in every election, for the purpose of gaining partizans to their standard. . . .³³

Another example of detail going into the constitution to protect the legislature against itself was that of the

³² *Ibid.*, p 451.

³³ *Ibid.*, p 453. The disposition of the problem of canals by writing existing legislative policy into the constitution provided no broad policy. The whole problem of canals, state aid to private enterprise, and debt limitation was a dominant factor in producing the 1846 Convention.

prohibition on lotteries. The changes were rung on the same argument, *pro* and *con*, as to whether this was a matter for the constitution or for the legislature. Cramer, who had argued for detail in the constitution on the matter of suffrage, argued against this particular prohibition, remarking somewhat sarcastically that the convention "had generally been in a habit of supposing that we have more wisdom and virtue than any other body of men, either before or after us, which was presuming too much."³⁴ Another delegate stated, in dubious logic, the counter-argument, which prevailed:

that the proposed limitation of the power of the legislature was . . . necessary and proper—proper, because the legislature ought not to possess a power which they ought not to exercise, and necessary because the experience of all nations had shewn, that the power, if given, would be abused.³⁵

On the other hand, when it was proposed that a legislative act providing for the termination of slavery within the state by 1827 be put into the constitution, it was defeated. In this case, it was argued that the legislature did not need the guidance of the constitution.

As a check on the legislature, it is . . . unnecessary. The truth and force of public opinion on this subject, is a sufficient restraint on the legislature, and there is therefore no reason to apprehend that the legislature, from any motive, can be prevailed on to postpone the day of emancipation. . . . Against this provision it is moreover urged, that if we omit to mention it in our constitution, it may hereafter be forgotten that slavery once existed in the state.³⁶

Other examples of the use of the argument against detail in the constitution could be cited. Sufficient evidence has been set forth, however, to indicate that there is no general principle or theory which can give meaning

³⁴ *Ibid.*, p. 569.

³⁵ *Ibid.*, p. 569.

³⁶ *Ibid.*, p. 497.

to its application. The Convention of 1821 was the first instance in New York of its use as a "policy determining" agency by a more or less popularly elected body. With this convention was begun the process which Mr. Lincoln, speaking specifically of state debt limitations, notes in the 1846 Convention in the following words:

. . . the provisions incorporated in the Constitution show that the people did not hesitate to resume power once surrendered to the legislature, thus limiting representative authority, and restoring to the people themselves power which they had learned could not be safely intrusted to their representatives.³⁷

It is interesting to see Mr. Lincoln's approval of these provisions, in view of his nostalgic reference to the "simplicity" of the constitution of 1777. An appropriate epitaph for this whole matter may be the following argument of a delegate in the 1821 Convention:

We are asked by the gentleman from Albany, whether we are afraid to trust the legislature? I am not afraid to trust the legislature at any time, if there is patriotism there; but I have known the time when there was neither honesty nor patriotism in our legislature.³⁸

Turning our attention now to the structure of government which emerged from the Convention of 1821, we find that the paramount feature was the abolition of those special institutions which were viewed by Mr. Lincoln as valuable because outside the stream of politics. There was already abundant proof, however, that it was futile to attempt to place important functions of government "above politics" by resort to mechanical devices, however ingenious. In the removal of the Council of Revision and the Council of Appointment action was taken unanimously and without debate on the floor. These two bodies had been marked for the ax by the controversy and the

³⁷ *Op. cit.*, II, 175.

³⁸ *Record, op. cit.*, p. 372.

discredit into which they had fallen. Their functions were assigned, piecemeal, to the executive, the legislative, and the judicial branches, or to the electorate.⁸⁹

In discussing the details of the re-distribution of these powers, the convention demonstrated greater favor for the executive and decided disfavor for the judiciary. The office of governor was equipped with somewhat greater power and independence; it was considered a direct expression of the popular will and responsible to that will. The judiciary, on the other hand, was severely criticized for its "excursions into politics" and its participation in the Council of Revision was characterized as irresponsible, as "power without a remedy." Indeed, the latent and open hostility to the courts provided the most acrimonious debates of the convention. Mr. Lincoln remarks: "The debates on this subject do not make very pleasant reading." The fact that several judges, including three judicial members of the doomed Council of Revision, were delegates to the convention was cited as evidence of the avidity of the judiciary for political activities. The prevailing attitude of the convention was that the Council of Revision should be abolished, *not because of the abstract theory of "separation of powers," but because the judiciary was not responsible to the people and should therefore have no part in the law-making process.* The convention ended by adopting provisions for the judiciary which left the existing judicial structure substantially unchanged, save for its participation in the Council of Revi-

⁸⁹ The Council of Revision was replaced by the executive veto, subject to defeat by two-thirds of both houses of the legislature. The duties of the Council of Appointment were distributed, by rather extensively detailed provisions, to the governor, with the consent of the senate (judicial and military officers), to the two houses of the legislature (secretary of state, comptroller, treasurer, attorney-general), to the courts (clerks and district attorneys), to city councils (mayors), and to the electorate directly (sheriffs, county clerks, coroners). See article four of the revised constitution.

sion, but which terminated the office of all incumbent judges, regardless of the terms of appointment.⁴⁰

Only a few of the delegates opposed checks and balances, as unnecessary in a democracy. The majority, however, sought to place the operation of checks and balances in the politically responsible branches of government. Nevertheless, the debates show that this action did not preclude the belief that there was a proper area within which judicial review would operate. As pointed out, the removal of the courts from acknowledged participation in political processes served only to purify the theory of judicial review, as being "above politics"; the application of the theory was left to the courts.

Another instance of the desire of the convention to simplify the operations of the check and balance system of representative self-government is found in regard to the senate. Led by Chief Justice Spencer and Chancellor Kent, members presented lengthy arguments for increasing the existing high property qualification for those voting for senators.⁴¹ The Chief Justice argued that to establish a common electorate for the two branches of the legislature

⁴⁰ A proposal to put into the constitution a judiciary article patterned after that in the federal constitution, in which all save the highest court would be left to legislative discretion, was attacked as subordinating the courts to the legislature and was defeated. The debate on the judiciary proposals showed again the bitter feeling against the courts. No attempt was made to deny that the convention was adopting, finally, a provision which would reach the judicial incumbents. It was attacked by many, however. The argument of one of these follows: "We are about to provide in our constitution for the removal of the incumbents in our high judicial departments, without having altered in any shape their jurisdiction, or the construction of the courts which they compose. By this, what do we say to the world? We say that we are about to make a constitutional provision, which has no other object than that of pulling from the bench of our supreme court certain individuals who may have become odious to a portion of the community. This is not worthy of the people of the state of New York, or of this convention. It will disgrace us." *Record, op. cit.*, p. 529.

⁴¹ While the convention extended the suffrage, the freehold qualification for holders of the offices of governor and of senator was retained.

would "break down a barrier of our constitution." The senate was not designed merely as a check, he contended, but as a check which rested upon the character of the electorate which it represented. His definition of this character reflected the current blend of economic interpretation (those who own should govern) and idealization of the virtues of property holders. Conceding that in the past the senate "has not been superior to the assembly in wisdom or gravity," he attributed this fact to the large electoral districts and to the intervention of the "party spirit." The establishment of single-member districts for the senate, he contended, would provide a basis on which "we may hope to see our senate what it ought to be, the council of ancients, composed of great, wise, good, and grave men." While this latter statement sets up an ideal correlation between landed property and the virtues of its holders, the bulk of his argument rests frankly upon the desirability of protecting the landed interest, even though it be a minority, from the inevitable competition of other interests.⁴² He appealed to the convention to "impress on our doings the seal of immortality" and to "endeavor to preserve to the landed interest of the country, one branch of the legislature. . . ." Chancellor Kent discoursed at length in the same vein, giving an even more detailed and graphic picture of the dangers which the future, with its increase of "large manufacturing and mechanical establishments," would bring unless "those who have an interest in the soil . . . retain the exclusive possession of a branch in the legislature."⁴³ In view of the prevailing

⁴² "At present the agricultural interest predominates; but who can foresee, that in the process of time, it will not become the minor body? . . . He would venture to predict, that the landed interests of the state will be at the mercy of the other combined interests, and thus all the public burthen may be thrown on the landed property of the state." *Record, op. cit.*, p. 218.

⁴³ "The danger which we have hereafter to apprehend is not the want, but the abuse of liberty . . . a stable senate, exempted from the influence

disfavor in which the Council of Revision and the judicial members thereof were held, Kent may have done his cause no good by openly joining the two issues. While the debate on this issue carried through three days, the record shows only Van Ness, also a judicial member of the Council of Revision, and two other delegates supporting the argument launched by Spencer. Judge Van Ness made the following interesting observation to bolster his plea: "It had been said, and it was not improbable, that this was the last Convention that would ever be assembled in the state; and if you now give out of the hands of the landed interests their rights, they can never be recalled." ⁴⁴

The opposition denied the alleged facts, the theories, and the inferences contained in these arguments. Martin Van Buren, in an extensive argument, appealed to the fact that the legislature, which had submitted the question of a convention on a wider suffrage, and the convention itself, were composed of a majority of farmers. He argued, from his years of experience in the state senate, that he had observed no positive correlation between such property requirements and the wisdom and responsibility of the members of the senate. To perpetuate them in the face of the lessons of experience might even make injustice the source of resentments against property. The "grave and portentous deductions" of the "honorable gentlemen" were drawn from forebodings also held by the framers of the first constitution, and even of the federal constitution. But experience had proved them groundless. "He said he was an unbeliever in the speculations and mere theories on the subject of government, of the best and wisest men, when unsupported by, and especially

of universal suffrage, will powerfully check these dangerous propensities; and such a check become the more necessary, since this convention has already determined to withdraw the watchful eye of the judicial department from the passage of laws." *Ibid.*, p. 222.

⁴⁴ *Ibid.*, p. 268.

when opposed to, experience." ⁴⁶ As for the contention that the new mode of election to the senate, suggested by the Chief Justice, would lift it above politics, Van Buren replied: "Parties would always exist, and they would always consult their interest in the selection of candidates for public places. Their first and chief object was success. . . ." When the vote was taken, the convention voted down the plea for a special suffrage qualification for the senate, 100 to 19.

It would be misleading to infer from this rejection of special property-group representation for the senate that the convention was prepared to take radical steps in the matter of the suffrage. That this was a dispute among property-holders over whether discrimination among them should be continued becomes abundantly clear as the debate over suffrage qualifications proceeded. The first speaker in general debate after the defeat of the Spencer proposal hastened to give a cautioning interpretation of his action. While the extension of the suffrage "was a principal purpose for which the Convention was called" and was hence "required by the people at our hands," nevertheless, "he was not one of those who believed that every person has an absolute right to elect his rulers; still less that they derive such right from social compact or grant. It was a question of expediency only, and not at all dependent on abstract principle." ⁴⁷

On the general question of the suffrage, the convention was a forum for debating and providing supporting theories for action already taken by the legislature. The suffrage provisions put into the constitution were virtually identical with those set by the legislature, not only for electing delegates but also for passing upon the final product of the convention. This latter fact was cited many times as a practical argument against restricting the suf-

⁴⁶ *Ibid.*, p. 261.

⁴⁷ *Ibid.*, p. 271.

frage beyond this point. The one notable deviation in the new suffrage provisions lay in the fact that, for the first time, a discriminatory qualification was put upon the negro. The convention having effectively demolished the freehold qualification in general, now made it apply only to negroes.⁴⁷

In following the leadership of the legislature and ratifying its action, the convention showed no independent capacity to estimate the forces which lay behind the demand for the extension of the suffrage. In 1826, an amendment was adopted which swept away the remaining restrictions on the suffrage, except those on negro suffrage. In retrospect, the imminence of this event renders even more interesting the overwhelming rejection of universal suffrage and the reconciliation of this action with the theory that "men are born free and equal," which was elaborated by the debates. Appeals to this theory were not entirely lacking. One delegate supposed that "the great fundamental principle, that all men were created equal in their rights, was settled and forever settled," and entered the plea that the convention "grant universal suffrage, for after all, it is upon the virtue and intelligence of the people that the stability of your government depends." To Chief Justice Spencer, however, the maxim that all men are born equal appeared to be "mere sound." Another held that this view of the rights of men "applied to them only in a state of nature, and not after the institution of civil government."⁴⁸ Still another pursued this line of argument with the following observation:

. . . in the formation of a social compact, which generally grows out of exigency, when the people are but a little removed from

⁴⁷ The value of the freehold was the same as that proposed by Spencer for the senate electorate—"two hundred and fifty dollars, over and above all debts and incumbrances charged thereon"

⁴⁸ *Record, op. cit.*, p. 180.

their barbarous and rude state, they are not particular in enumerating the principles upon which they thus unite; but when they become more enlightened, they will undertake to say who shall belong to their family.⁴⁹

Livingston, turning to constitutional history rather than to political theory, declared:

When these states separated from the mother country, and formed constitutions of government, they declared that all men were free and equal, and yet in the next breath they gave a practical refutation of the doctrine they had advanced, by depriving their citizens of equal rights, in granting privileges to the rich which were denied to the poor. And why did they exclude the latter from the right of suffrage? Public policy required it.⁵⁰

Evidences were not lacking that the fear of the "manufacturing population," which had been used unsuccessfully by the supporters of a restricted electorate for the senate, was an element in the opposition to universal suffrage. The *Record* states that one delegate "went into the subject at some length, and endeavored to shew that from the nature of their habits and occupations, a manufacturing population must be more ignorant, and more subject to an arbitrary or corrupt influence, than any other description of people."⁵¹ Another delegate made bold to predict that "the time would come, when posterity would look to those who now opposed universal suffrage as benefactors of the state."⁵²

These excursions into political theory were undertaken for the purpose of adapting the equalitarian theory of the revolutionary period to the views of those who were now actively concerned with the institutionalizing of "self-government." The undertaking was successful, and it prevailed in the decision reached by the convention. There were those who would have pushed the revised theories to support suffrage qualifications more restricting than

⁴⁹ *Ibid.*, p. 185.

⁵⁰ *Ibid.*, p. 198.

⁵¹ *Ibid.*, p. 281.

⁵² *Ibid.*, p. 282.

those upon the electorate which would pass upon the new constitution. Three weeks, out of ten, were devoted to debating the subject of the suffrage. Provisions which finally prevailed were at first rejected. At one time the whole matter was sent back to a special committee. In the end, however, the principle that "those who carry the burdens of government" should have the vote was successful. Moreover, the definition of burden was extended, over vigorous opposition from some, including the judges, beyond taxpayers to cover service to the state, in the militia or on the highways. This coincided with what had already been done by the legislature. Only in the case of the negroes did qualifications regarding amount and kind of property apply; and only in the case of this small minority did the revised political theory prove effective. As already pointed out, in the case of the other remaining restrictions the pressure of the forces behind universal suffrage swept away the work of the convention within five years.

Despite the difficulties which had attended the protracted process of calling this convention, no action was taken to regularize the procedure for the future. For the first time, however, the constitution was equipped with a provision for its amendment. In their discussion the delegates recognized that changes in the basic law might be necessary at any time, but concluded that such changes must be made as a result of extended and persistent deliberation. The process adopted involved initiation of a proposed amendment by majority vote of both houses of the legislature, following which it was to be publicized for three months before the election of the next legislature, re-passed by two-thirds of the elected members of each house, and then approved by a majority of the electors qualified to vote for members of the Assembly.⁵³ The rec-

⁵³ The framework of this amending process still prevails, in the requirement for passage by two legislatures and ratification by the people. The

ord of the convention indicates that only a few hours were spent in consideration of this proposal by the body of the convention, and that no more than a dozen delegates participated in the debate. The report of the select committee was accepted with very little change.⁵⁴

The debate on this provision shows no challenge to the inclusion of an amending provision. On the contrary, there seemed to be a general feeling that it would make the constitution more acceptable to the electorate. Moreover, toward the end of the convention one delegate declared that only this article made him willing to accept the work of the convention. It is interesting to note, however, that he also felt this provision would lessen the necessity for a convention in the future.⁵⁵ The burden of such debate as did occur was concerned with the refutation of the arguments of a single delegate, that the proposed process of amendment was too prolonged and cumbersome. In the course of the argument the federal amending process was criticized for permitting amendments "with too great facility." The debates concerning

degree of legislative agreement, however, has been *cut* to a majority and that of popular participation to a majority *of those voting*. These less rigorous requirements were set by the Convention of 1846 and have been continued without change. It is significant to note the shift, from positive agreement to passage of time, which is implicit in the change.

⁵⁴ In the general debate on the committee report no changes were made. On a later reading, and without debate, the requirement of a two-thirds majority in the first legislative adoption was changed to a simple majority—while leaving the two-thirds requirement for the final passage, before submission to the people.

⁵⁵ The remarks of this delegate were as follows: ". . . were it not for one provision, which formed a part of the new system, but was altogether wanting in the old one, . . . he might, perhaps, have thought it his duty to vote against it altogether; and that was the provision for future amendments, which afforded to the people a means of correcting what we had done amiss, and of curing its present and future defects with reasonable facility, *without resorting to the difficult and dangerous experiment of a formal Convention*, which no man he believed, would wish again to see take place, so long as the acknowledged evils of our present system were at all tolerable." *Record, op. cit.*, p. 656. (Italics not in original.)

the amending process were singularly free of appeals to theory. The particular provision adopted was borrowed from the Massachusetts constitution and defended on the grounds of the desirability of rational deliberation. It seems evident from the action of the convention that the legislature, rather than a specially chosen body, was deemed the proper agency for effectuating constitutional changes, although explicit provision for popular participation and final disposition was included. While admitting the necessity for a regularized procedure for constitutional provision, the convention did not intend that changes should come without prolonged discussion; moreover, they stipulated an amount of agreement which proved subsequently to be impractical and unrealistic.

The constitution drafted by the Convention of 1821 was submitted as a single question to the electorate. It was approved. The personnel of the convention included many prominent figures of the current political scene, both state and national. Nevertheless, their work sheds a dubious light on such an idealized requirement as that contained in the following remark: "If a constitution is framed, it ought to be done by men who have the greatest capacity for looking ahead and planning a harmonious political organization of the state as it will be."⁸⁶ Mr. Lincoln remarks that by 1846, when the next New York State constitutional convention assembled, "the field of constitutional reform was already white to the harvest." In the interim between the two conventions, eight amendments had been adopted, which swept away the restrictions on the suffrage—except for the negroes—and the property qualifications for the governor and senators, ex-

⁸⁶ Swisher, Carl B., *California Constitutional Convention, 1878-79* (Pomona College, 1930), p. 115. An appendix to the record of the New York Convention of 1821 states that only forty-three of the one hundred twenty-six delegates participated in the debates, following which there is a list of thirty-five names of those "among the most prominent" in participation.

tended the elective principle to more public offices, and altered the detailed tax provisions. Nevertheless, "the time had apparently come for a radical departure from many of the governmental policies then in force, and an expansion and enlargement of popular rights, with corresponding restriction of legislative and executive power."⁵⁷ The pattern of constitution-making was essentially the same as in 1821. The trend toward making a constitution an instrument of popular government was even more clearly visible. The resulting constitution was essentially new, with only eleven sections of the constitution of 1821 remaining unchanged.

One provision of the constitution of 1846 deserves our special attention. It declared that the issue of a constitutional convention should go to the people every twenty years. The Convention of 1846 had been preceded by a situation similar to that prevailing before the Convention of 1821, that is, popular agitation and legislative inaction. In 1844, petitions from twenty-four counties had asked that the question of holding a convention be submitted to popular vote. The governor asserted that no convention would be necessary if the legislature would act on amendments pending before it. The matter of a convention became a party issue in the legislature, a convention bill was passed over vigorous opposition, and the people voted for a convention by an overwhelming majority. The record of the 1846 Convention shows as little debate concerning the periodic submission of the question of a convention as was true in the case of amendment by the legislature, adopted in 1821. In opposition to the motion to strike this section out of the committee report, one delegate declared that "it asserted a great principle that all power was inherent in the people and that once in twenty years they might take the matter into their

⁵⁷ Lincoln, *op. cit.*, II, 106.

own hands." And, mindful of the buck-passing which the legislature had done prior to the convention, he added that "without this provision the legislature might be continually tormented with applications to amend."⁶⁸

However timeless the tenets and basic values of democracy may be, the wisdom of human beings in meeting the changing problems of self-government does not operate consistently on that level. In defending the proposed restriction on negro suffrage, a delegate at the Convention of 1821 declared that they were "standing on the foundations of democracy." Despite this bold argument, a constitutional convention occupies but one of the council chambers of the superstructure of democracy existing in its time. Only on the level of honorific symbols, not of democratic politics, could it be said that a constitution is "intended to be a piece of fundamental legislation which would of itself immediately reorganize and redirect the political life of the state."⁶⁹

A constitutional convention, then, is an institution

⁶⁸ *Debates and Proceedings in the New York State Convention for the Revision of the Constitution* (S. Croswell and R. Sutton, reporters for the *Argus*. Printed at the office of the Albany *Argus*, 1846), p. 833. The provision adopted was to the effect that at the general election of 1866, and every twenty years thereafter, the question of a convention "shall be decided by the electors qualified to vote for members of the legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the legislature at its next session shall provide by law for the election of delegates to such convention." *Ibid.*, p. 567. After the political deadlock in connection with the convention in 1886, which postponed its meeting until 1894, the matter was made self-executing, rather than dependent upon legislative action. Its automatic character was reiterated in an opinion by Attorney-General Bennett when the question arose in 1936. It is interesting to note, in regard to the calling of a convention by popular vote, that an erosion similar to that which had occurred in the alternative process of amendment had taken place—that is, the degree of agreement required has been scaled down, it is now a majority of those voting on the question of the convention, which, as we shall see in connection with the 1938 Convention, may be far short of a majority of those voting for the legislature.

⁶⁹ Swisher, *op. cit.*, p. 114.

which is in and of the politics of democracy, subject to those ills that democratic flesh is heir to. It does not operate *in vacuo*, but is rather a function of the problems and institutions of its time. Such easy demands as that the convention be "above politics," or that its work adhere to an undefined distinction between fundamental law and ordinary legislation, may be rewarded by the use of these very symbols as a cover for politics. Such easy inferences as that the caliber of representation in a convention will be higher than that of ordinary legislatures, because the work of the former is "more important," will await documentation before they are convincing.

Adequate criticism of a given constitutional convention must rest upon detailed analysis of its workings, within the context of forces and institutions of which it is a part. The realities of democratic politics—of party politics, pressure politics, personal ambitions, social needs—must be accepted as the raw materials for study, much more than the abstract concepts which are too often used to relieve members of a democracy of the responsibility for its travail. Criticism there must be, but it should be based on an awareness of the facts rather than on a naive application of ideals. The constitutional convention is part of democracy's experience. It deserves to be examined as such, free of the verbal extravagances which have been committed in the name of "democracy's ideals." This is the pattern which our preliminary explorations of the theory and practice of constitution-making have revealed. This is the pattern which we shall follow, therefore, in our analysis of New York State's 1938 Constitutional Convention.

CHAPTER III

CONSTITUTION-MAKING BY THE CALENDAR: ORIGINS OF THE 1938 CONSTITUTIONAL CONVENTION IN NEW YORK STATE

The Constitutional Convention held in New York State in 1938 was, in a sense, a "people's convention." That is, it was called into existence by the operation of the constitutional provision which placed the issue of a convention directly into the hands of the electors every twentieth year.¹ The opportunity for the electorate to pass upon this issue did not depend upon action by some other agency of government, but only upon the calendar. In what sense, however, viewing the matter politically rather than legalistically, can there be a "people's convention"? To what extent can and do the "people" act outside and free of the established channels of public leadership? Examination of the actual processes of constitution-making in New York State provides interesting evidence on these questions.

The general election of 1936 was the time appointed by the New York State Constitution for the electorate to pass upon the issue of a constitutional convention. This election was also the occasion for electing a president of the United States, as well as a full slate of State officers. The issue of a constitutional convention was overshadowed. Moreover, the political parties showed no interest in drawing the issue into the light. The political parties did, in fact, exercise some negative leadership. Their opposition to having a convention was revealed in the legislature,

¹ Article XIV of the Constitution of the State of New York. For the historical origin of this provision for periodic submission to the electorate of the issue of a convention, see Chapter II, especially pages 59-60.

during discussions on a bill to put the issue to the voters. The attorney-general issued a legal opinion to the effect that "no action is necessary or proper to carry the constitutional mandate into effect." The bill became law, despite this. The gratuitous gesture of passing the unnecessary act became the symbol of the "helplessness" of the legislature in the face of the constitutional mandate. It provided the exit for the political parties.² Party leaders gave the public little guidance on the convention issue. A week before the election was to take place, *The New York Times* ran an editorial under the caption, "No Convention Needed Now." The burden of its argument was that the absence of leadership on this important matter constituted a *prima facie* case against the holding of a convention. The voters, declared the editorial, "have had little guidance from the usual sources: the rival platforms are silent on the subject, campaign speakers have had nothing illuminating to say about it, civic bodies have given it only casual or belated consideration. There is no organized public behind this particular referendum. . . ."³

Following this editorial, the issue caused a mild flurry in New York City. Spokesmen for Tammany Hall announced unanimous opposition to "charter revision, proportional representation, and the proposition calling for a constitutional convention." Mayor La Guardia, on the other hand, issued a blanket endorsement of all five matters on which a referendum was being taken, including the constitutional convention. Governor Lehman, speaking at the Democratic grand finale with President Roose-

² In signing this bill, Governor Lehman appended a memorandum in which he took cognizance of the controversy over the mandatory character of the constitutional convention and added "To remove any doubt, I believe this bill, directing by legislative enactment that such a question be presented to the people should be signed and become law" From *The New York Times*, May 22, 1936

³ *The New York Times*, October 27, 1936.

velt, in Brooklyn, urged a favorable vote on the holding of a convention. The American Labor Party also issued an endorsement. *The New York Times* remained unmoved, stating in an editorial on election day: "Vote No. Except for a few last-minute appeals, there has been little public demand for another convention now."

The voters of New York State went to the polls on November 2, 1936, in numbers indicating a really vital democracy. So far as the constitutional convention was concerned, however, the power of self-government came to rest in the hands of less than half of those who went to the polls.⁴ Viewing the results geographically and in terms of local majorities, we find that the "call" for the convention came from New York City. Four of the five counties in that area favored the convention, while Albany was the only one of the fifty-seven up-state counties in which the convention was favored.⁵ Viewed broadly in terms of the principle of majority rule, the decision to hold the convention was made by approximately twenty-five percent of those who went to the polls, as against the twenty-one percent who declared their opposition to the convention. The proposition won in New York City by a two to one vote, with fifty-five percent of those voting indicating their stand on the convention. The proposition lost in the up-state regions by a five to three vote, with thirty-seven percent of those voting declaring themselves on the issue.⁶ The turnout in this election, in terms of

| | | | |
|-----------------------------|-----------|--------------------|-----------|
| * Total gubernatorial vote. | 5,690,093 | Vote on convention | 2,603,879 |
| Outside New York City.. | 2,766,902 | " " " | 1,075,063 |
| New York City. | 2,823,191 | " " " | 1,528,816 |

⁵ The issue carried in Albany County by six thousand votes. Some of this margin was undoubtedly supplied by the desire of local business organizations to have the convention in their city.

For a map showing the division of the state into counties and senatorial districts, see below in this chapter, after page 88

| | | | |
|---------------------------|-----------|-----------------------|-----------|
| * Favoring the convention | 1,413,604 | Opposed to convention | 1,190,275 |
| Outside New York City | 395,968 | " " " | 679,095 |
| New York City | 1,017,636 | " " " | 511,180 |

registered voters, was high. In the sixty-two counties the median percentage of the registered voters who voted for governor was above eighty. In contrast to this, the median percentage of those voting for governor who voted on the convention was just half that.⁷

Thus, left to their unguided judgment, the "people" had spoken. Apathy up-state, though heavily negative, was outweighed by the action of New York City. The purpose of holding a convention had been little explained, attacked, or defended. The question of holding a convention had hardly achieved the status of being an issue before the public. The constitutional convention won the first round by default. This not uncommon experience of delegating powers of self-government to a minority of the electorate, active for whatever reasons, has been so pronounced in the matter of constitution-making that it has almost achieved the status of a principle. Surveying the experience of the various states in this matter, Professor Walter F. Dodd reached the conclusion that "Power with reference to the calling of a convention, must, it would seem, be lodged in the hands of those who take sufficient interest to vote on the matter."⁸

The strategy of silence pursued by party leaders opposed to the calling of a convention had failed to achieve the desired result. A convention was to be held. The affirmative vote on the convention created a situation which was of vital concern to the political parties. Competition set in for party control of the "people's conven-

⁷ In the percentage of registered voters who voted for governor, the figures run from 99 to 96 in the five New York City counties, and from 95 to 68 in the upstate counties. In the percentage of those voting for governor who voted on the issue of a convention, the figures run from 61 to 49 in the downstate counties, and from 74 to 19 in the upstate counties; one-third of the latter counties ranged from 33 to 19 percent.

⁸ *Revision of State Constitutions*, *op cit*, p. 54. We have already noted, in the development of both methods of constitutional amendment in New York State, this shift in the conception of "majority rule" from the mathematical to the active group.

tion," upon which depended, among other things, the important issue of representation in the two houses of the legislature. The Republican and Democratic parties in New York State compete in terms of a sectional cleavage which the Republicans have successfully translated into a "fundamental principle of self-government." This so-called principle was fixed in the constitution by the apportionment put through by the Republican controlled Convention in 1894. The maintenance of this scheme of apportionment was now stated baldly by the Republicans as a matter of self-preservation, for both the party and democracy.

At the beginning of competition for the delegates who would go to the convention, the Democratic party seemed to have the edge. In the election of 1936 the Democrats had succeeded in gaining control of a majority of New York's state senatorial districts. Newspaper correspondents wrote that this augured ill for Republican control of the convention, as the delegates were to be elected by senatorial districts (save for fifteen elected from the state at large). W. A. Warn, of *The New York Times*, remarked, "The Republicans, when they contemplate the prospect of a constitutional convention which in all probability the Democrats will dominate, must do so with chills of apprehension."⁹

The facility with which the Democrats had been unexpectedly out-manuevered and placed in the minority in the previous two conventions, however, might have made the political prophets more cautious. The deadlock which persisted from 1886 to 1894 had terminated in a shift of public sentiment which placed the convention in the hands of the Republicans. The circumstances which preceded the holding of the Convention of 1915 provide an even more interesting comparison. The referendum on the

⁹ *The New York Times*, Nov. 8, 1936.

convention was held in 1914, two years before it would have been mandatory, by authorization of a legislature under the leadership of the Democrats. The holding of a convention was approved by a narrow margin, with a very small percentage of the voters expressing themselves. Such a shift in public favor then occurred, in the electing of delegates, that the Republicans were swept into control of the convention. Elihu Root, who later became president of the convention, *a propos* the effort of the Democrats to steal a march on the Republicans, remarked, "the lesson is that it does not pay to be too acute and adroit and cunning in American politics." While neither of the political parties had jumped the starter's signal in getting into the arena in 1936, the Democrats seemed to have the edge in public favor at that time. But the issue of the constitutional convention had scarcely entered the consciousness of the voters.

Was that issue now being more clearly presented, under more positive leadership? Governor Lehman raised his voice, to commend the calling of the convention. He characterized it as a "remarkable opportunity for a thorough re-appraisal of our Constitution and for the consideration of many important changes." He recommended, in his message to the legislature on January 6, 1937, that past practice be followed by establishing a non-partisan committee to assemble and collate data for the use of the convention. "It seems to be extremely short-sighted," he wrote, "for us to do nothing until the day the convention assembles." This recommendation, however, was unable to scale the heights of partisanship. A bill was passed by the Senate, but the legislature adjourned without authorizing such a fact-finding committee, despite Governor Lehman's assurance that the committee would be restricted to fact-finding, with no power over the order or the character of business to be handled by the convention. Lacking legislative authorization to appoint an official

committee, the Governor announced, on July 7, the appointment of an unofficial committee. It was headed by Charles Poletti (Democrat, subsequently elected a delegate) and composed of representatives from both parties and from citizens' organizations. In justifying his action, Governor Lehman asserted, "Without adequate preparation there will inevitably be great waste of money, time and effort to the end that the very objects of the convention may well be defeated."

The setting up of this "non-partisan," fact-finding committee, however, did not quiet the troubled political waters. The issue of a "non-partisan" committee had already been completely assimilated to partisan politics. Speaking to the Women's Division of the Democratic State Committee on this issue in early June, Chairman Poletti charged that "leaders of the Republican State Committee and of the Republicans in the Assembly would make 'a deliberate attempt to sabotage the constitutional convention.' . . ." In reply to this attack a prominent Republican appealed again to the fiction that this was a "people's convention" which should be subjected to no "outside influences." "Personally," he is reported to have said to press correspondents, "I would not be so presumptuous as to lay before the delegates of a State convention, agenda, data, or whatever name may be given to it as a course of action for them to pursue." Continuing, he clinched the case for a "free convention" with this argument: "I personally am opposed to anything that smacks of 'must' legislation. The important decisions the delegates must arrive at they should arrive at of their own volition without outside interference."¹⁰

¹⁰ Both these items are taken from *The New York Times*, June 9, 1937. Mr. Samuel Untermyer, Democrat of New York City and later delegate-at-large to the constitutional convention, attacked the action of the Governor in similar terms, saying that he was "attempting to usurp the powers reserved to the voters, whose function it was to name delegates to

While this issue of a "non-partisan" committee to establish a neutral zone for the compilation of data was bobbing up and down on the surface of the partisan struggle, the "real issues" were being forged and hammered out on the political anvils. Although the work itself which was to be done by the convention was closely related to specific problems and forces, the "issues" presented to the people were largely created out of hand and presented on a level of scare-mongering and motive-questioning generalities. By this procedure, the political parties were making an appeal for a vote of confidence rather than stating the specific policies which were to be followed at the convention. This action affords an illustration of the fact that *democracy delegates much of its power of self-government to its political parties, in the first instance.* When political parties resort to the pretense that the "people" rule directly it should be clear that they deal thus in "unrealities" for a purpose. Democracy's leaders are persuading it to be satisfied with un-responsible leadership. Honeyed words about a "free convention" should not obscure that fact.

Under cover of appeals for "nonpartisan" delegates, which came from both Democratic and Republican leaders, the campaign was conducted on the usual, strictly partisan, basis. The Democrats attacked the Republicans as reactionary, saying that they were not to be trusted with the power which could nullify all progressive legislation through control of the convention. Governor Lehman (who had declined nomination as delegate-at-large) in an appeal for Democratic delegates, characterized the Democratic party as "the real friend of progressive and humane legislation."¹¹ Two weeks before the election, Senator Robert F. Wagner (running as a Democratic

the convention without interference from any source" Reported in *The New York Times*, July 25.

¹¹ Reported in *The New York Times*, October 20, 1937.

delegate-at-large) charged that the record of the Republicans showed they had "openly resisted or secretly sabotaged every progressive step and every liberal measure." In his speech he presented, for the first time, a Democratic seven-point program.¹² The substance of the program was to place "beyond doubt" the power of the legislature to finance public relief; to authorize state funds for slum clearance and low-cost housing; to empower the legislature to encourage just prices for farm products; to improve and extend home rule; to facilitate law-enforcement and the efficient administration of justice; to promote "fair representation in the legislature" and "oppose any attempts to gerrymander the legislative districts of the State"; to declare in "unmistakable terms" the prerogative of the legislature to pass legislation for the public welfare. Much of this program, it is interesting to note, is directed at the removal of limitations upon legislative power in regard to specific matters.

The Republicans, too, continued the 1936 national campaign by casting the issues of the convention in the mold of the attack on the New Deal. The dangers of allowing the Democrats, with their "radical theories," to approach the fundamental institutions of the state were loudly proclaimed. This kind of argument was expressed very early in the campaign, by George R. Fearon, former state senator and majority-leader of the Republicans in that body (who was later nominated and elected as delegate-at-large). In an address before the New York Bar Association he was reported as having "discussed the dangers to American institutions involved" in the forthcoming constitutional convention and as having said that "it was of the utmost importance that the constitutional delegates . . . should be 'men of unquestioned devotion to our institutions.'"¹³ The veiled warning in these remarks

¹² Speech at Rochester, October 22, as reported in *The New York Times*, October 23.

¹³ *The New York Times*, January 30, 1937.

was made more explicit in a speech he delivered a few days before the election in November:

If the New Dealers control the coming convention you are going to have the same contempt for American institutions, the same disregard for our courts, the same centralization of authority, the same greed for power, the same disregard for individual and minority rights that we have had in Washington ¹⁴

The chairman of the Republican State Committee, William Murray, delivered these warnings throughout the state. A few days before the election he declared:

The millions of clear-thinking voters . . . will not entrust the task of revision of their Constitution to the group that so boldly ignored the spirit of our fundamental law in Washington. They are against court packing and they are against regimentation. They want to protect the liberty our forefathers gained for us.¹⁵

Behind this barrage against the "radical New Deal element," the Republican voters up-state were being aroused to protect the existing scheme of apportionment. It was declared that local self-government was in danger, that the Democrats would consolidate some of the smaller counties and "set up a new type of government which would be centralized in Albany." Mixed with this appeal was one based on "fear" of New York City. On one occasion Chairman Murray declared that Democratic control would mean domination by the metropolitan area. The Democrats in this area, he asserted, "think there are too many counties upstate."¹⁶ From Charles H. Griffiths, chairman of the Westchester County Republican Committee, came a similar warning: "A Republican majority . . . is necessary to forestall consolidation of counties and radical revision of local governments which would be

¹⁴ *Ibid.*, October 29.

¹⁵ *Ibid.*, November 1.

¹⁶ In a speech to the Warren County Women's Club, reported in *The New York Times*, May 23.

sought by a Democratic majority." ¹⁷ Another voice from Westchester County was heard a few weeks later, with William F. Bleakley (later nominated and elected to the convention) urging that the election of Republican delegates " ' is more essential to the success of the Republican Party and to the future of the state ' than the election of a Republican governor." ¹⁸

A report on the campaign was presented in an article by James Kieran in *The New York Times* for August 15.

The organization political leaders [the story ran] are casting anxious eyes at the possibilities of reapportionment . . . The Republican leaders are going around the State trying to warn the upstate G. O. P. followers that they stand to lose their last ace in the hole in the Legislature if they let the Democrats control the convention and put over their own reapportionment

From the Democratic side came the austere voice of Governor Lehman, speaking at a meeting of the Democratic State Committee (convened for the purpose of nominating a slate of delegates-at-large): "I feel very strongly that we of the Democratic party should and will yield any apparent local or party interests for the good of the State as a whole." Following him, at the same meeting, the realistic James A. Farley, gave a send-off to the assembled party leaders. He urged

the importance of Democratic control of the constitutional convention which, among other things, may make a reapportionment of Senate and Assembly districts and change the constitutional provisions relating to reapportionments in a manner which would insure Democratic control of the Legislature in both its branches for many years to come.¹⁹

While the political barkers were exhorting the voters to line up for the *election* of delegates to the "big show," the *nomination* of delegates hardly achieved the status of

¹⁷ *Ibid.*, May 28.

¹⁸ *Ibid.*, June 24.

¹⁹ *Ibid.*, September 25

a featured attraction. For the most part, the power to nominate was left with the party organizations. If the "people" were to bestir themselves in behalf of "their" convention, the time was not yet. The issue was to be joined only when the contest was between bearers of different party labels rather than at the point of deciding who should carry the label.

The direct primaries were held on September 16, 1937, for the purpose of nominating 153 delegates, three from each of the fifty-one senatorial districts. On September 12, *The New York Times* carried the following news story: "While the New Deal undoubtedly will come well into the foreground as an issue . . . at the convention . . . , comparatively few contests will figure at Thursday's primary election in which that issue will be directly involved." The story could have gone further, and stated that there were very few contests on any issue. In other words, there were very few challenges to the work of the party organizations in making up the lists. The Tammany slate of anti-New Deal Democrats went unopposed, although in some districts in New York City contests resulted from a split within the district Democratic organization. Outside New York City, there were only two Republican contests with competing slates and another case of a single independent candidate; the latter was unsuccessful in the primary, as was also true of the slate in the thirty-second district which had revolted against the organization nominees. On the Democratic side there were contests in the three districts in Erie County, as a result of which two independents gained the nomination. Altogether, for both parties, there were nine contests in New York City and six up-state (out of a total of 153 seats per party).

With the party organizations in such complete and undisturbed control of nominations, it is not surprising that the primaries did not arouse popular interest or partici-

pation. Even in those cases, however, where there was a challenge to the organization candidates, the evidence of popular interest was slight. The percentage of popular participation (based on the total registered voters) in the fifty-seven up-state counties was very low. In three-fourths of the counties, popular voting was under seventeen percent. The median stood at ten percent. In one case no votes were cast.²⁰

The nomination of the fifteen delegates-at-large was placed, by law, directly in the hands of the state committee of the respective parties. The Republican panel was selected by the executive committee of the state committee. It was ratified by the full committee in thirty minutes. The work of the executive committee was marked by a violent controversy between up-state leaders and the leaders of two New York City counties over the nomination of Mayor LaGuardia. The up-state leaders argued that nominations should go to "loyal party members of distinction." Kenneth Simpson, New York County leader, led the fight for LaGuardia, contending that his name would attract the progressive elements, notably the American Labor and the City Fusion groups. To this the up-state leaders replied that the Mayor was not accepted as a Republican by party members outside New York City.²¹ LaGuardia's name was not placed on the list. Later, that

²⁰ The figures on the upstate primaries were procured from the respective county boards of elections. The figures on popular participation in the primaries in New York City, where the majority of the contests took place, are lacking. The annual report of the Board of Elections did not contain these figures. After persistent inquiry, we were told that the figures had been destroyed, the law requiring their preservation only for one year subsequent to the primaries.

²¹ Earlier in the campaign LaGuardia had expressed irritation at the "unfair representation" accorded New York City, and said that he hoped that the city would gain a majority representation in both houses of the legislature as a result of the convention. The fight by Simpson to gain "acceptance" of LaGuardia by the upstate Republicans, for purposes of elections, was a continuation of his campaign which had been successful in the 1937 elections.

of Newbold Morris, president of the city council, was withdrawn as the uncertain negotiations for American Labor party support proceeded. As adopted by the state committee, the Republican list gave eight of the fifteen places to New York City.

The nomination of the Democratic candidates for delegates-at-large went smoothly, under the leadership of James A. Farley, state chairman. On the eve of the meeting of the state committee, W. A. Warn, correspondent for *The New York Times*, wrote as follows:

Next year's Constitutional Convention may prove epochal in the political history of the State. But less than twenty-four hours in advance of a meeting at which fifteen of the most important functionaries for the convention will be selected any observer here would be apt to doubt it. Members of the governing committee of the dominant party in the State, which in all probability will elect its entire slate of delegates-at-large, are showing little or no interest in the State committee meeting, which promises to be a cut-and-dried affair. . . .²²

The presence of so few of the party leaders, reported this observer, was an unusual situation and was the subject of "surprised comment." With practically every important leader in the state present the following day, the full committee ratified the "Farley slate" in short order. Names of supporters of Tammany or of Senator Copeland were conspicuously absent in a list headed by Senator Wagner. Governor Lehman declined a place on the list, in favor of continuing his position as governor-adviser in relation to the convention.

The open domination by Farley of the nominating of the Democratic candidates for delegates-at-large was the source of much adverse criticism from Republican quarters. The episode fitted neatly into the picture they were painting of "foreign" interference and control. The

²² *The New York Times*, September 24.

charge had its tactical advantage from the political point of view, although actually there was no essential difference in the methods used by the two parties. Such slight difference as there was in the techniques of domination simply reflected the state of organization leadership in the two parties. Whatever the degree of unity within the parties, a united front was presented to the public by a process of "democratic centralism"—that is, agreement on policy by a small group at the top, followed by ratification of this policy by the "democratic body." This is, of course, a common feature of party leadership and party organization.

A few weeks before the election, Governor Lehman again expressed concern over the lack of popular interest in the election of delegates. His remarks were featured by *The New York Times* in an editorial. As the election date loomed up, the political leaders themselves stressed the importance of popular action. William Murray, chairman of the Republican State Committee, warned against a repetition of the "popular apathy" shown in the vote on the convention. He declared that in many years "we have not faced a more important election." On election day, November 2, 1937, the voters responded to the rather belated political leadership, by showing greater concern for the convention issue than at any earlier time. The voters did not turn out in numbers equal to that of the previous year, which was a general election year. Nevertheless, there was substantial popular response. The percentage of those voting for district delegates, based on the number voting for governor the previous year, did not drop below fifty in any county, with the median percentage standing at seventy. Generally speaking, the voters attended to the election of district delegates in approximately the same numbers as to the election of assemblymen, who were being voted on at the same time. This was a marked contrast to the popular response to the

convention issue in 1936. The degree of popular participation in the voting on the delegates-at-large was uniformly lower, by ten to fifteen percent. This is a not unusual indication of the greater appeal of local candidates, despite the supposed greater importance and prestige of the delegates-at-large. The contrast between the degree of popular participation in the election, and of popular apathy in the nomination, of delegates suggests the importance of party leadership.

The election returns provided an appropriate climax to this campaign of party rivalry. For the third consecutive time, contrary to the prophecies of many observers, the Republicans had succeeded in wresting control of a constitutional convention from the Democrats. Upstate the party lines had held firm. The Republican party regained up-state territory which had been lost to the Democrats in the latter's peak year, 1936; it lost to the Democrats only eight district delegates in the entire up-state area. The Democrats carried Albany County (thirtieth senatorial district) by the usual wide margin. The race in neighboring Rensselaer County (thirty-first senatorial district) was very close, with the six candidates falling within a spread of a thousand votes (out of sixty thousand); the final vote gave the Republican party one seat, with the other two going to the Democrats. The Democrats also carried one of the three senatorial districts comprising Erie County. Of the remaining fifty-four counties outside New York City, the Republican party carried twenty by a ratio of two to one or better. In only eight counties was the race close; of these, five were included in senatorial districts which gave the Republicans a comfortable victory. Viewing the results in terms of the twenty-eight senatorial districts outside New York City, the Republicans carried fifteen by a ratio of two to one or better while losing in the three cases mentioned above. The weakest of the Republican delegates from the thirty-second district

could have been eliminated by a shift of one percent of the votes cast. In four other districts the race was close enough that a five percent shift would have produced a like result. The picture remains, however, that of an overwhelming victory for the Republican party, with the Democrats unable to hold slight gains previously made in other populous districts up-state. The voters up-state had not favored holding the convention, but the up-state Republicans had now succeeded in electing seventy-six of the eighty-four district delegates from the area outside New York City.

Party lines were somewhat more obscured in New York City, traditional Democratic stronghold, by independent voting and the presence of such independent groups as the American Labor Party and the City Fusion group. There are twenty-three senatorial districts within the city, thus allowing it sixty-nine district delegates.²³ The Democrats failed to sweep their traditional stronghold, even though they approximated such a result. Eighteen districts fell completely to the Democrats. The Republicans, in coalition with City Fusion, managed to sweep two districts; in another district the Republicans elected one of the three delegates with the support of the American Labor party.²⁴ One candidate bearing the label of "independent Democrat" was elected by the combined support of Republican, City Fusion and American Labor party votes. In one case an American Labor Party man was

²³ Strictly speaking, the twenty-fourth senatorial district is both in New York City and "upstate." It includes two non-contiguous counties, Richmond and Rockland. The Republicans nosed out the Democrats in Rockland County (which is outside New York City), but lost in Richmond County by a margin which cost them the district.

²⁴ It should be noted that two Democratic candidates were endorsed and supported by the Republican party. These two were Francis Martin, Presiding Justice of the First Department of the Appellate Division, and John J. Dunnigan, Democratic leader in the state Senate. There was one case upstate, Mr. George J. Moore, in the thirty-fourth senatorial district, of a Republican candidate endorsed by the Democrats.

elected with the support of City Fusion. The score in New York City, then, gave the Democrats sixty delegates, the Republicans and "associates" eight, the American Labor party one. The total count on district delegates stood at eighty-four for the Republicans, sixty-eight for the Democrats and one for the American Labor party.

There were also fifteen delegates-at-large, to fill out the roster of 168 delegates. Here the presence of the American Labor party had its important effect. In retrospect it has been said that the American Labor party muffed the opportunity to hold the balance of power in the convention. For reasons of party tactics, the refusal of the Republican party to run LaGuardia, and the presence of many names objectionable to it on the Democratic slate, the Labor party divided its support on delegates-at-large three ways. They endorsed two Republicans and seven Democrats, and put up six independent candidates of their own. The seven Democrats endorsed by the Labor party were elected (as were the two Republicans similarly endorsed). The eight Democrats lacking this endorsement were defeated by a Republican and City Fusion coalition vote which was considerably less than the Democratic and American Labor vote. This refusal of the American Labor party to follow along with the Democratic organization policy put the Republicans in control of the convention. Had the Labor party supported the fifteen Democratic delegates-at-large, the convention might have been evenly divided between the two major parties. It is interesting to speculate upon the consequences of such an event, but it seems improbable that the Labor party would have gained in any case. The final score, in terms of formal party allegiance, gave the Republicans control of the convention with ninety-one delegates, as against seventy-six for the Democrats and a lone Fusion-American Labor party delegate. How much the conduct of affairs at the convention was to be determined by

formal party allegiance is a matter which will concern us in due course.

The people of the United States have had difficulty in understanding that politics is of the essence of self-government. It is paradoxical that in American democracy the terms "politics" and "politicians" tend to have derogatory connotations. It is ironic that politicians themselves are able to use these terms as accusations against their opponents. This situation is, in part at least, a function of a "utopian wish" that the ends of self-government be achieved by some immaculate and automatic process. It is significant that the Fascists appeal to this basic suspicion of "politics." There is a fiction that the "people" are somehow participating *directly* in self-government when they send *representatives* to a constitutional convention, in a way that they are not when they send representatives to the legislature, and hence that the convention will be "above politics." This fiction gives an accentuated play to various aspects of the "non-political conception of politics." Democracy, however, is *representative government* and the realities of the processes of self-government are to be found in those instruments which wield the delegated powers of the "people." The chief and inescapable instrument which mediates between the people and their government is that of political parties. Democracy finds its powers delegated, in the first instance, to a group of active, professional organization workers. This has been the result of insufficient popular interest and of institutional necessity. Like many of the instruments which serve democracy, political parties are not notably democratic in any ideal theoretical sense, either in their structural organization or in many of their operations. This is true, however well they may carry on the functions of democracy in accordance with its general rules. Moreover, political parties are instruments both of public service and of private, organizational gain. These

two functions are inextricably mixed. The striving for position between parties is, naturally and inevitably, to serve the party as well as to serve the "public"—and the former is very often a competitor of the latter, so that the end-result is, usually, some mixture of the two.

We have seen, in connection with New York's constitutional convention, that the political parties did not step out onto the firing line until the issue had been brought down from the abstract level of "constitutional revision" to the level where concrete, material interests of the parties were involved. The "people," acting through a minority, set the process in motion, but once in motion it engaged the organization interest of the political parties. Thence-forward, the "people" left their case with the professionals. When the electorate next spoke directly, it was to choose between the nominees of the parties, although they were exhorted by the party leaders to be non-partisan in their choice. As Chairman Murray phrased it, speaking of the expense involved in holding the convention: "Let's not have that money wasted. Let's elect a Republican majority."²⁵

Generalizations about party politics are dangerous, in view of the immense variety of strategic necessities and personal factors which are the springs of action. To say that the constitutional convention had been made a party issue and that the personnel selected by the organization leaders was drawn overwhelmingly from some level of the organization ranks implies nothing concerning the extent of party control over the convention or the caliber of the personnel. It does illustrate, however, that it is meaningless to speak of the convention as above party or above politics; it also illustrates that political parties are the professional governors in a democracy, and that the convention was an opportunity as well as a "necessity" in terms

²⁵ Reported in *The New York Times*, June 11, 1937.

of organization politics. Evidence enough has been cited to show that the convention had become a party issue. It is in point, now, to give some attention to the personnel of the convention.²⁸

The convention was in active session for approximately four months. Each delegate received a salary of \$2,500, plus one round-trip expense from home to the convention. The total of appointive jobs available as patronage was three to four times the number of delegates. Chairman Murray had insisted publicly, during the period when nominations of convention delegates were being made by the organization leaders, that the nominations must not be "political rewards." Nevertheless, persons with recognized party status made up a considerable number. Of the total membership of the convention, not more than thirty delegates were without ascertainable important party service or connections; of the questionnaire group of eighty, there were only seven. As has been suggested, every level in the party hierarchy, local, district, county, state, and national, was represented. Service on the state committee was in the record of twenty-seven delegates (with fifteen serving at the time of election); those with service on the county committee (including thirty chairmen or vice-chairmen, ten of them incumbents) num-

²⁸ The information on the membership of the convention is drawn from various sources. Questionnaires were sent out to all the delegates, and eighty (of the 168) delegates were kind enough to reply with fairly full information. This information was supplemented, and the information concerning those who did not reply was compiled by resort to the following sources: 1) personal interviews with some members of the convention, with other political leaders, and with newspaper correspondents; 2) *Pictorial Record of the Convention*, an officially authorized record (published in Troy, N. Y.), which gives pictures, with brief biographies, of the delegates, pictures of the various committees, and brief information concerning the organization of the convention—it is more in the manner of a "memory book" than a source of important information concerning the convention; 3) the official publications of New York State, *The Red Book* and the *Legislative Manual*, both covering a period of years; 4) *Who's Who*, for New York and for the United States.

bered sixty-four; other holders of party positions of leadership or of service at party conventions, state or national, numbered sixty-seven. Experience in public office, either appointive or elective, also characterized the delegates. Two-thirds of the delegates had at some time held elective office; thirty-seven of the questionnaire group had held no elective office, but twenty-eight of these had active organization connections, and nineteen had held appointive office. Sixty, or nearly one-third, of the delegates were holders of public office at the time of their election to the convention. There were eight Assemblymen (and eleven ex-Assemblymen), eight Senators (and fifteen ex-Senators), three Congressmen (and one ex-Congressman), and one United States Senator. There were also three elected State administrators. The largest category of incumbent office-holders came from the judiciary, with twenty-six delegates—eleven Supreme Court Justices, four from the Appellate Division of the Supreme Court, two judges of the Court of Appeals, and the other nine from the minor courts. This unusually large representation of the "judicial temperament" may well have been a genuine attempt, as was claimed, to raise the political level of the convention. On its face, it appears to have been a gesture, for purposes of public consumption, toward the "non-political conception of politics." Whether genuinely misguided or deliberately ingenuous, this move was to result more in criticism of the judicial members than in raising the tone of the convention. A lesson might have been learned by referring back to the Convention of 1821 and its vitriolic move to kick the judiciary upstairs, but out of politics. Since the Convention of 1821, however, the legal profession had come to dominate the political scene; and if that convention was a "farmer's convention," the one in 1938 was a lawyer's convention. Despite the appeal of Charles Poletti (a lawyer and a justice) that

a "minimum" of lawyers be elected, two-thirds of the membership of the convention consisted of lawyers.²⁷

Turning from bare statistics to living persons, we gain further impressions of the personnel picture. The eight Republican delegates-at-large can be identified in the following terms: ²⁸

Frederick E. Crane. Chief Judge of Court of Appeals; member of this court since 1917

Edward F. Corsi. (Endorsed by American Labor party.) Civil servant; had held various administrative posts; defeated for the United States Senate; had been delegate to several party conventions.

George R. Fearon. Chairman of Onandaga County Committee; member of State Assembly, 1916-20, State Senator, 1921-36, and minority leader, 1931-36.

Benjamin F. Feinberg State Senator since 1933 and member of Senate Judiciary committee at time of election to convention; permanent chairman of Republican state convention, 1936.

Harry E. Lewis. New York Supreme Court Justice for the second judicial district since 1921; before that, county judge, then district attorney for Kings County.

Philip J. McCook. New York Supreme Court Justice for first judicial district; in party service, had been district captain, member of New York County committee, had been major in the U. S. Army.

Abbot Low Moffat. (Endorsed by American Labor party.) State Assemblyman since 1928, chairman of important Ways and Means committee; in party service, had been district captain, member of county committee.

Charles B. Sears. New York Supreme Court Justice for eighth

²⁷ There were slightly more than two-thirds with legal training; several lawyers were also bank presidents, some were counsel for corporations presidents (railroad, insurance). The remainder of the delegates was scattered widely among more than a score of callings, with only one or two in each of most of the categories. Highest in number were the categories of real estate and insurance, newspaper publisher, and mortician, with four each. There was one farmer.

²⁸ Unless otherwise specifically stated, the office listed first is that held at the time of election to the convention.

judicial district and Presiding Justice of the Appellate Division, Fourth Department, Supreme Court Justice since 1917; delegate to the New York Constitutional Convention in 1915.²⁹

The seven Democratic delegates-at-large can be identified as follows:

Mrs. Caroline O'Day. Member of U. S. House of Representatives (serving third term); in party service, member of Westchester County committee; associate-chairman of Democratic state committee.

Lithgow Osborne. New York State Conservation Commissioner (appointive, office held since 1933); in party service, state committeeman from Cayuga County.

Charles Poletti. New York State Supreme Court Justice, first judicial district (appointed by Governor Lehman, elected to full term, 1937, elected to lieutenant-governor's office with Governor Lehman, 1938, after the convention).

Harlan W. Rippey. Associate Judge of Court of Appeals (elected Nov. 3, 1936); previously on New York State Supreme Court, federal district court; frequently attorney for State and United States.

Morris S. Tremaine. State Comptroller (elected 1926, reelected five times).

Samuel Untermeyer. Lawyer, something of an "elder statesman" in New York's Democratic party, perennial delegate to national conventions of party.³⁰

Robert F. Wagner. United States Senator; delegate to the 1915 Constitutional Convention; previous to becoming U. S. Senator (1926) had served as state assemblyman, lieutenant-governor, Supreme Court Justice (New York).

In addition to Senator Wagner and Justice Sears, who were delegates-at-large, there were seven delegates who had served in the 1915 Convention. Most notable of these

²⁹ The above four judges received their offices through popular election.

³⁰ Mrs. O'Day and Mr. Untermeyer were unable to take active part in the work of the convention because of illness.

was former-governor Alfred E. Smith, who fell easily into the category of "elder statesman."²¹

There were six women delegates—the first time in New York State history that women had participated in a constitutional convention. In addition to Congresswoman O'Day, Democratic delegate-at-large, these were:

Mrs. Mae V. Gallis, Democratic state committeewoman (for six years), Queens County.

Mrs. Clara Lurz, Democratic committeewoman (for eleven years), Queens County.

Mrs. Bertha Moore, Republican, vice-chairman of Westchester County committee; prominent for years in Republican party affairs, member of board of governors of Women's National Republican Club.

Mrs. Annie L. Morrell, Republican state committeewoman (since 1932), business woman

Mrs. Helen Z. M. Rodgers, Republican, attorney, twice defeated for Congress.

It is fair to say that the delegates to the constitutional convention were a representative cross-section of the "governing group" built up by political parties. The age distribution was not out of balance, considering that our political leaders are weighted more on the side of age than was true of the first conventions of the revolutionary period. The age distribution at the 1938 Convention showed approximately the same number between the ages of thirty and fifty as over fifty. In addition to the few

²¹ Others were John T. Dooling, lawyer, chairman of Tammany Hall law committee, with a long period of service to Tammany, a single term as assemblyman, 1901-3, James A. Foley, surrogate for New York County, also with long-standing service to Tammany as well as having been state assemblyman, 1907-12, and state senator, 1912-19, Francis Martin, Presiding Justice Appellate Division, First Department, with a long record as district attorney and judge, endorsed by both parties (a gesture which the Democrats failed to reciprocate); Martin Saxe, Republican, lawyer, with party service but no elective public office since 1915; Robert S. Waterman, Republican, lawyer, special surrogate; Perry G. Williams, Republican, lawyer, delegate to four Republican national conventions.

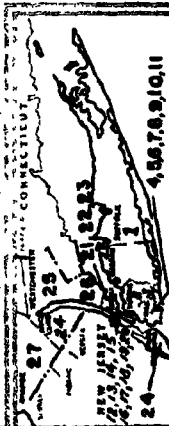
already mentioned who might fall into a category of "elder statesmen," there were others who might seek to qualify. There was William S. Bennett, Republican, lawyer, one-time state assemblyman and Congressman. There was Thomas H. Cullen, Democratic Congressman (since 1919), state committeeman, state assemblyman, 1896-98, state senator, 1899-1918. There was Joseph A. McGinnies, Republican, pharmacist, state assemblyman for twenty years (1916-35), speaker of the assembly for ten years (1925-34). There was also a group of a score or more with records of long party service but without other notable "rewards," in the form of elective office, and such.

Then, at the bottom of the political ladder, was a small group of the younger men, possibly in the early stages of their political career. Some of these (listed alphabetically) will be suggested. There was Adrian P. Burke (age 34), New York City, Democrat, son-in-law of Justice Francis Martin, lawyer, who had held appointment as assistant counsel to legislative committee. There was Edward J. Delany (age 32), Democrat, lawyer, first-term state assemblyman, who had served as secretary to the New York County committee of the twelfth assembly district. There was Murray Gootrad (age 34), New York City, Republican, lawyer (Gootrad and Gootrad), president of 23rd assembly district Republican club. There was Edwin L. Kantowski (age 31), Buffalo, Democrat, state assemblyman (since 1931), business (insurance and bonds). There was Henry W. Koch (age 32), lawyer (with insurance firm), Seneca Falls, Republican, county chairman, corporation counsel for Seneca Falls. There was J. Kenneth McCabe (age 33), Brooklyn, Democrat, lawyer, member of county committee, who had been delegate to various Democratic conventions. There was Dudley L. Moore (age 32), Amsterdam, lawyer (Myers, Moore & McKee), bank director, member of Republican county committee,

active in party. There was Kenneth W. O'Hare (youngest member of convention, age 31), Long Island, Democrat, lawyer, local leader in Queens County, chosen as delegate (to fill vacancy) by the other two delegates from second senatorial district (Queens County); the two delegates who chose him were William J. Maloney, undertaker, member of Democratic state committee, and Joseph D. Nunan, Jr., lawyer, state senator (since 1931) and important senatorial committee chairman, previously assemblyman. Finally in our list there was Abraham H. Schiff (age 32), Brooklyn, lone American Labor-City Fusion delegate, business (president of Chemical Maintenance Corporation), long an advocate of slum clearance. Along with this group might go Ernest D. Leet (age 37), Jamestown, lawyer, active in and officer of the Association of New York Young Republican Clubs, justice of the peace (since 1930).³²

Between the "elder statesmen" and the "beginners" was the large group of experienced party and public office-holders. Among these were both the senate majority leader (John J. Dunnigan, Democrat, New York City, state senator since 1915, party leader in senate since 1932) and the senate minority leader (Perley A. Pitcher, Watertown, state senator since 1925, minority leader in 1937, succeeding George R. Fearon, mentioned above as delegate-at-large to the convention). So was the minority leader (Democratic) in the assembly (Irwin Steingut, assemblyman since 1922, party leader in the assembly since 1930, the only Democratic speaker, in 1935, since Alfred E. Smith, in 1913). Also a member was the most recent (1936) Republican gubernatorial standard bearer (Wil-

³² In another category, there were two recorded as professors as well as practitioners of law: Philip Halpern (age 36), Buffalo University, had served as counsel to the Committee on Practice and Evidence of the New York Commission on the Administration of Justice; James B. McNally (age 42), New York City, first vice-chairman of the New York County Democratic committee.



liam F. Bleakley, county executive of Westchester County, lawyer-banker-judge, who had retired from a state supreme court judgeship, held since 1928, to run for governor in 1936).

If this picture of the intricacies of human relations making up the tangled web of democratic politics needs further detail, attention might be called to the pattern of some of the district delegations. We have seen above that the Democrats won the twenty-fourth district delegation by having a margin in Richmond County sufficient to overcome a close defeat in Rockland County. James A. Farley was born and got his political start in Rockland County. In 1917 he was elected Democratic county chairman of that county, an office which he has since referred to as the "first really important political position" he had held. Rockland County has never ceased to be his bailiwick.²² The delegation from the twenty-fourth district was hand-picked by Farley. They were "organization" men. One of them had served as county chairman in Rockland County. On the fringe of New York City proper, as is Rockland County, lie Nassau and Suffolk counties (comprising the first senatorial district) and Westchester (comprising the twenty-fifth and twenty-sixth districts). The delegation from the first district consisted of the following men: Robert Moses, independent Republican, chairman of the State Council of Parks, Republican gubernatorial candidate in 1934; W. Kingsland Macy, chairman of the Suffolk County Republican committee, ex-chairman of the Republican state committee, local "boss"; James L. Dowsey, Sr., Republican, county attorney (ap-

²² In 1922, Farley was unable to persuade any Democrat to run for state assembly from Rockland County. Being county chairman, he felt obliged to make the race himself—and, despite the "monotonous regularity" with which the G. O. P. had carried the district, he won. His early experiences in Rockland County left their permanent influence on him. See his account in *Behind the Ballots* (Harcourt, Brace & Co., 1938).

pointive office), right-hand man of J. Russell Sprague (co-leader and "boss" of Nassau County), member of Republican state committee. In nearby Westchester County the two delegations were similarly loaded with "organization" delegates. We have discussed above one of the delegates, William F. Bleakley. With him were the following two men: Herbert C. Gerlach, attorney, with long experience in party service, who had been supervisor, chairman of county board of supervisors, Commissioner of Finance (county), member of county executive committee (an "organization" man, he has since succeeded Bleakley as county executive); and William J. Wallin, lawyer, vice-chancellor of New York State Board of Regents (legislative appointment, 1933). A leading delegate from the other Westchester district was Livingston Platt, member of the law firm of Bleakley, Platt and Walker; mayor of the Village of Rye, Mr. Platt had served as member of the Republican county committee and of the executive committee of that committee and had gone as delegate to many Republican state conventions. With Livingston Platt was Mrs. Bertha Moore, whose party service we have discussed above. The third delegate was J. Addison Young, official referee of the Supreme Court, Second Department (appointed Jan. 2, 1937), retired Supreme Court Justice, earlier district attorney of Westchester County. In the neighboring third district (Queens County) the delegation consisted of Mrs. Gallis and Mrs. Lurz, whose party service has been referred to above, and Mr. J. F. X. Sheridan, lawyer, former teacher, former professional baseball player, brother of Queens County leader. Proceeding up the Hudson river, we find that the twenty-eighth district (Putnam, Dutchess and Columbia counties) had as its delegation Frederic H. Bontecou (state senator since 1934, Republican county chairman of Dutchess County), Hamilton Fish, Jr. (Congressman since 1919, member of Republican state com-

mittee), and Albert C. Callan (Republican, newspaper publisher, state assemblyman, 1909-10, fifteen times a delegate to Republican state conventions). In the twenty-ninth district (Ulster, Greene and Delaware counties) the delegates were Philip Elting (Republican county chairman of Ulster County and member of the Republican state committee, lawyer-banker, recognized as a "boss" with power and influence), Seth T. Cole (attorney, with offices in Albany and in New York City, with the firm of Saxe, Cole and Anderson, Republican, but with no party service and no previous elective public office, who has held appointive office of Deputy Commissioner and Counsel for New York State Department of Taxation and Finance, very successful and with some political influence), and Arthur F. Bouton (lawyer, bank president, Republican state senator, 1923-27, member of Republican county committee). In the thirtieth district (Albany County, long the bailiwick of the powerful O'Connell Democratic organization) the delegates were Francis Bergan (New York Supreme Court Justice for third judicial district, in close relation with O'Connell organization, formerly county court justice, assistant attorney general, clerk in office of minority leader), Gilbert V. Schenk (New York Supreme Court Justice for third judicial district since 1933, formerly corporation counsel of Albany, 1922-27, surrogate of Albany County, 1927-32, anti-New Deal), and Robert E. Whalen (lawyer for New York Central Railroad, delegate to various Democratic state conventions, anti-New Deal, affiliated with O'Connell organization).

It would be tedious to continue this discussion of delegates to the end. The foregoing brief identification of various delegates is intended only to make clear that the stream of democracy, for purposes of the constitutional convention, did not rise higher than its political sources. How the manifold ambitions and capabilities of the dele-

gates would express themselves at the convention, how binding the organization influence, how meaningful the party labels, these can be determined only by a careful study of the convention in action. It is well to start, however, with a realistic perception of the human origins of the politics of democracy. The range from qualified to unqualified, from experienced to inexperienced, from political hack to statesman can be considered a "normal" cross-section of the political leadership in New York's democracy.

When the result of the election of delegates became clear, one observer remarked: "The Republicans have won; the convention will do little." This prophecy was not based on an analysis of the total ability which was represented; it was based, rather, on the *party character* of the convention and the dominance, in the campaign, of the party issue of re-apportionment. Leaving this prophecy to stand the test of our later analysis of the work of the convention, we may conclude this analysis of the forces which had carried the convention thus far by making several observations. The Republican party had achieved its primary objective, that of control of the convention for the purpose of being on guard when its party interests were at stake. This did not mean, however, that the Republican party, as a party, was shouldering full responsibility for the convention. As the disinterest shown by the two parties from the beginning had indicated, a constitutional convention is closer to issues of policy than the internal unity of either party can easily withstand. Hence, it was looked upon as a source of head-aches for the party nominally in control, and both parties would have willingly avoided it. This meant that party labels would mean both much and little, depending upon the particular issue involved and the particular tactics employed. A maximum of credit to the party with a minimum of responsibility for the convention as a whole—this was to

characterize the strategy of the majority as well as the minority party. Also, the maneuvering was to be aided by the fiction that politics and partisanship have no place in a constitutional convention—and hence are in abeyance. With the lines of political responsibility thus loosely, and not entirely frankly, drawn, the convention was bound to be a confused mixture in which it would be easier to discern than to isolate the factors of party politics, pressure group politics, sectional antagonisms, factional opportunism, personal ambitions. Power without responsibility was the congenital infirmity of the constitutional convention, and the political forces which nourished it were little concerned with establishing clear-cut lines of responsibility. Indeed, the notion of "clear-cut lines of responsibility" is more a statement of an abstract ideal than it is a description of the processes of democratic policy-forming bodies, including constitutional conventions.

CHAPTER IV

JOB POLITICS AT THE CONVENTION

For several weeks prior to the convention the people of New York State were treated to a display of political shadow boxing. Both parties disavowed any intention of using the convention for political purposes. Indeed, so fervent were the asseverations proclaiming the convention as the people's own that there were moments when it appeared as if party leaders on both sides had convinced even themselves that a basic expression of democracy was at hand. The sovereign people, after solemnly and carefully selecting their representatives, were about to revitalize the organic law of the state. Politics, naturally, was adjourned. William S. Murray, Republican State Chairman, following the regular March meeting of the Republican State Committee, issued a statement to the effect that

it was the unanimous opinion that no action should be taken or recommendations made regarding the constitutional convention, inasmuch as the delegates were duly elected by the people and will organize and carry on the business of the convention by themselves.¹

This position was maintained during the intervening weeks, and on the very eve of the convention's first session Democratic and Republican leaders alike vowed to observe a "hands-off policy" to the end that the popular will be not thwarted.² Following the road so well paved for many decades by jurists, academicians, and laymen, New York's statesmen contributed enthusiastically in perpetuating the shibboleths long associated with constitu-

¹ *The New York Times*, March 11, 1938.

² *Ibid.*, April 5, 1938.

tional processes in America. They were playing the game in the way required by American tradition; and in playing the game they, consciously or unconsciously, set up a smoke screen obfuscating the inevitable thrust and counter-thrust of party politics. Little did it matter that these political protestations were showered upon a public devoid of any appreciable interest in the approaching convention or the course it might take. Doubtless, the general public would have profited more had the Democratic and Republican parties presented convention platforms. By resorting to the nebulous concept "the people," both parties were in a better position to escape responsibility for politically motivated performances, while popular evaluation of the convention's record was rendered more difficult. But there was no general demand for responsible political leadership. The public acquiesced in, even applauded, the parade of democratic myths, while leadership, by default, was lodged in the hands of groups and shifting combinations of groups powerful enough to exert the proper pressure at the proper time. Once the convention began its deliberations, the disadvantage of irresponsible leadership in matters of policy was supplemented by an immediate disregard of avowals to refrain from making political capital out of opportune situations.

Woven closely into the pattern of the convention are certain threads, the perception of which renders the record of the deliberations more intelligible. Some of these stand out sharply; others are less evident. Perhaps the most obvious of these is that which reveals the running fights and pitched battles between the Democratic and Republican parties which liberally intersperse the debates on policies and issues. Many of the issues raised were frankly and deliberately political. Closely paralleling this theme, and equally apparent, is the frequency with which party lines were crossed by recalcitrant factions within both parties. In the case of the Democrats, intra-party discord

was a product of New Deal and anti-New Deal sentiment on the part of powerful leaders, whereas differences among the Republicans were developed by antithetical conservative and liberal forces, coinciding roughly with upstate and metropolitan delegates. Under these conditions party leadership on many social and economic questions was at best only tenuous.

The conservative elements of both parties, by uniting, easily were able to control the convention. Concessions to liberalism, when made, resulted from a fortuitous coincidence of two factors: first, unity on the part of liberal delegates; and second, political expediency on the part of conservatives.³ The conservative coalition was especially harmonious and effective during the closing days of the convention when most of the major amendments were either pushed through or defeated.

Inter- and intra-party controversies were further complicated by the presence on both sides of the aisle of delegates animated by aspirations for the governorship. This ambition often proved more troublesome for the delegate's own party than for the opposition.

In this resumé of convention themes it must be borne in mind that pressure-group lobbyists were present in full force. They besieged the delegates at every turn, played an active role in the disposition of every important issue, and at times spoke from the very floor of the convention. Recognizing no party lines, obeying no political leadership, and interested only in concrete results, these forces on occasion wrote and secured the adoption of whole sections of constitutional articles.

³ Several of the "liberal" measures adopted merely confirmed laws already on the statute books. They were made "constitutional" as a safeguard against possible future judicial decisions depriving the legislature of jurisdictions it had already exercised "Labor's bill of rights" (Introductory 679), most of the social welfare provisions (Ints. 685, 686, 687), and the prohibition of racial discrimination (Int. 667) are in this category.

Partisan stratagems, party factionalism, conservative-liberal divisions, personal political ambitions, and the manipulations of a multitude of interest groups, then, were major constituents in the process of amending the Constitution of New York State. There were very few divinely-inspired expressions of the sovereign will. As the more realistic would expect, the convention was subject to the same influences which govern the functioning of most representative assemblies, and it reacted in much the same way. It behaved as "normally" as any legislative body.

It will be the purpose of this chapter and of those immediately following to present an analysis of the convention's work as a whole. Special emphasis will be laid on the primary forces at work—political parties and pressure groups—and their motivations, objectives and techniques. As is generally the case, the parties were activated by two desires: the desire for jobs and the desire to promote policies which would gain for them the largest public following. These objectives gave rise to a number of issues at the convention, issues which may be divided roughly into questions of "job politics" and questions of "policy politics." To these we may add a third category, questions of "pressure politics": those sponsored or opposed by the interest groups who played such a dominant part in the deliberations. As far as is possible these categories will be treated separately. This procedure should make easier a comprehension of the methods and the effectiveness of the major forces to which the convention responded. It is to be hoped that a clearer light will thus be thrown on the work of constitutional conventions, and that a basis will be provided for more realistic thinking in this small field of the science of politics. The remainder of this chapter will present a few examples of "job politics" at the convention—those instances when the Democratic and Republican parties were swayed by consideration of pa-

tronage or the desire to increase or consolidate organizational strength.

The New York Constitutional Convention of 1938 was convened on April 5 and labored about four and a half months. Were it not for the fact that the scope of its powers were, legally speaking, almost unlimited, the entire proceeding might be viewed as a special session of the state legislature. In very few respects did the structure and deliberative processes of the convention resemble the pattern which, in the absence of concrete testing, has so frequently been substituted for realities in studies of constitution-making. From the very beginning the adjournment of "politics" was itself adjourned. The same forces and pressures operative during the legislative season plied their trades in the convention. The theatre was given a new name, but the actors were the same.

Throughout the afternoon and evening of the day preceding the formal opening of the convention, Democratic and Republican leaders and delegates held party meetings to decide upon questions of organization. On the surface, every attempt was made to avoid the charge of politics. Party caucuses were called "conferences," and at one evening session a party leader, not a delegate, ostentatiously withdrew following dinner. But politics cannot be destroyed by legerdemain. The conservative *New York Herald Tribune* refused to be taken in by such superficial performances. Commenting upon conferences and caucuses, Edwin S. McIntosh, Albany representative of that paper, concluded: "It takes brass-rimmed 'specks' with rather thick lenses to detect the difference."⁴

Faced with the primary and very practical problem of organizing the convention as a working body, the delegates of both parties immediately fell back upon leaders

⁴ *New York Herald Tribune*, April 5, 1938. For a survey of pre-convention party activities see also, *The New York Times*, April 4, 5, 1938.

and procedures long familiar to those versed in the recent political history of New York State. As the majority party, the Republicans were charged with the duty of organization. For a time, it was reported, a few of them toyed with the idea of making Alfred E. Smith president of the convention.⁶ Foreseeing a split between New Deal and anti-New Deal Democratic delegates, some Republicans were eager to capitalize early and fully upon this intra-party cleavage. It was a beautiful opportunity to publicize in striking fashion the lack of cohesion within the opposition's forces. Refusing to countenance this dramatic suggestion as too hazardous, party leaders decided upon Frederick E. Crane, Chief Judge of the Court of Appeals. He suited their purposes admirably: a Republican of long standing, but for years, by virtue of his position, above immediate party politics; a man who would have the respect and confidence of the people without betraying the interests of his party or attempting to dictate the policies. He was a good "front" man, who succeeded, nevertheless, in making an enviable record as the convention's president.

The remaining convention leaders were selected on the basis of their ability and experience as party leaders; each one was, or had been, a public or party office holder. Former Supreme Court Justice William F. Bleakley, from Westchester County, was elected first vice-president of the convention. He was the Republican party's standard bearer in the gubernatorial campaign of 1936 and still was considered by many in his party a potential candidate for governor. His supporters hoped his record as a delegate would serve as a spring board for securing the party nomination for the 1938 election following closely upon the heels of the constitutional convention. They were certain at least that his position as first vice-president would

⁶ W. A. Warn, *The New York Times*, April 5, 1938

"not contribute to his unavailability." * To place Justice Bleakley still more in the public eye, they designated him chairman of the important committee on industrial relations and workmen's compensation, a committee destined to deal with one of the major economic issues of the convention.

For floor leader, the Republicans finally settled upon Perley A. Pitcher, of Watertown, whose experience as minority leader of the New York State Senate would be invaluable when occasions produced inevitable inter-party maneuvering on the convention floor. For a period prior to April 5, considerable pressure for this position was exerted on behalf of George R. Fearon, of Syracuse. Mr. Fearon, also a potential candidate for governor, had preceded Mr. Pitcher as Republican floor leader of the Senate, and his political and forensic powers were well respected. Despite his large following, objections to him were raised by the Republican State Committee, who feared that to press his candidacy for the majority leadership might leave the impression that the Old Guard was in the saddle, seeking to dominate the party and the convention.⁷ As a consequence, Mr. Fearon was pushed into the background for the time being, emerging later as a force in the convention only by the weight of his own political abilities.

On the Democratic side, Senator Robert F. Wagner, of New York City, was elected second vice-president of the convention by the delegates, while his party honored him with the position of minority floor leader. Since his duties as United States Senator from New York would necessitate frequent absences from the convention, two additional floor leaders were designated by the Democratic party: John S. Dunnigan, of the Bronx, New York State

* Edwin S. McIntosh, *New York Herald Tribune*, April 5, 1938.

⁷ *The New York Times*, March 11, April 21, 1938.

Senate majority leader, and Irwin Steingut, of Brooklyn, Assembly minority leader. These appointments assured the Democrats of experienced political supervision for the duration of the convention.

It is of interest to note that, with the exception of President Crane, every convention officer was chosen from among the political party leaders. All were designated by their respective state organizations and for years had been accustomed to thinking and acting in terms of party interest.⁸

The facade of non-partisanship quickly dissolved in the face of the convention's first function—the appointment of committees. The intention of the Republican majority to have complete control of all convention committees was made evident right from the start. In all, thirty-four committees were set up and the membership of each was made heavily Republican.⁹ All chairmen were Republicans. In selecting his committee chairmen, President Crane consulted with Republican leaders both inside and outside the convention; the state party committee played an especially prominent role in this regard.¹⁰ With perhaps seven or eight exceptions, every convention committee

⁸ Mr. William S. Murray, chairman of the New York State Republican Committee, acted as "liaison officer" in the task of organization. (*New York Herald Tribune*, April 5, 1938.)

⁹ In recognition of the importance of new problems, several committees were added to the list established by the 1915 Convention: housing; social welfare, agriculture; highways, parkways and grade crossings; and industrial relations and workmen's compensation (*Record of the Constitutional Convention of the State of New York, 1938*, pp. 15-16. Hereafter, this source will be referred to as the *Record*.) Other committees were banking, bill of rights, canals, cities, civil service, conservation, contingent expenses, corporations and institutions, counties and towns, education, future amendments, governor and other state officers, Indian affairs, insurance, judiciary, legislature its organization, legislature: its powers, library and information, militia, printing, privileges and elections, public utilities, revision and engrossment, suffrage and qualifications to hold office, rules, state finances and revenues, state institutions, taxation, and villages. (*Record*, Index, pp. 162-163.)

¹⁰ Edwin S. McIntosh, *New York Herald Tribune*, April 4, 7, 1938.

chairman had long had an effective voice in the councils of the Republican party and had served either as a judge, a key legislator, or a state or county party officer. Pre-convention oratory to the contrary, party leaders were resolved that the "people" were to be properly guided in voicing their sovereign will.¹¹

But, before convention machinery could distill into reality the desires of the people, it required lubrication. As is customary with the functioning of representative assemblies, patronage provided the lubricant. The Republican leadership made it clear that it intended to take the lion's share of about three hundred and fifty convention jobs involving expenditures of \$400,000. The first formal session saw the creation of the committee on minor offices, made up of six Republicans and three Democrats, with floor leader Pitcher as chairman.¹² Both the majority and minority members of this committee were active party leaders. So enthusiastically did the committee approach its work that President Crane was finally forced to announce that no one already on the state payroll could be at the same time in the pay of the convention.¹³

Following the pattern generally visible during the legislative sessions, the struggle over patronage took on an intra-party color. This was especially true of the Republicans, where party leadership rarely has been as coercive as in the Democratic state organization. "The Republican State Executive Committee wrangled all day over which clerk should come from which county, or whether one county was getting enough, or possibly too much. Meanwhile anxious candidates haunted hotel lobbies." ¹⁴

¹¹ W. A. Wain predicted in *The New York Times* the ultimate success of the Republican party at the convention because it had "trusted party men on guard in all the working committees of the convention." (May 8, 1938.)

¹² *Record*, p. 30.

¹³ *Ibid.*, p. 41

¹⁴ *The New York Times*, April 19, 1938.

Party officers and workers were the chief beneficiaries. Mr. Daniel H. Skilling, Secretary of the Democratic State Committee, was made an assistant secretary of the convention; a similar position was awarded to Miss Margaret H. Remington, an active member of the Republican State Committee.¹⁵ A large number of clerical and secretarial positions went to Tammany and Republican county and district leaders.¹⁶ Through no stretch of the imagination can the scramble for convention patronage be differentiated from similar scenes enacted each year during the opening days of the legislative season. Once the convention was fully organized and ready to deliberate, the most superficial observer recognized it for what it was—a super legislature, manned by the same officers and subject to the same motives, the same procedures and the same forces. Would the ensuing weeks witness the production of results of "constitutional" quality?

Party politics of the old-fashioned variety was an active catalyst, producing violent reactions within the convention. Many measures were introduced because of their undoubted political value and implications, and received from the delegates a frankly political treatment. Others, harmless in origin, by astute manipulation were twisted into propositions of political significance. Party lines in these instances generally held firm. In a message to the delegates, delivered during the early work of the convention, Governor Herbert H. Lehman, with real optimism, declared that "The deliberations and actions of the Convention I am confident will not be based on political or partisan considerations."¹⁷ His confidence was rudely shaken. The very proposal which had occasioned his message received the crudest sort of political treatment.¹⁸

¹⁵ *The New York Times*, April 19, 1938.

¹⁶ Warren Moscow, *The New York Times*, April 27, 1938.

¹⁷ *Record*, p. 373.

¹⁸ This was the bill prohibiting unreasonable searches and seizures. It will be discussed more fully later.

Throughout the convention each party frequently charged the other with being politically motivated, and as frequently itself played fast and loose politically on every possible occasion. "Statecraft," pleaded Senator Dunningan, "must not be impeded by party strategists."¹⁹ Statecraft, if one is to judge by the history of the convention, is a technique almost inseparable from the elements of party strategy. Time and again, delegates of both parties, rising ostensibly to debate the issue at hand, digressed into protracted excoriations or eulogies of party motives and practices. The Republicans, eager to denounce the New Deal, seized every available opportunity to score. Selected by his party to close the chief debate on the searches and seizures amendment, James P. Hill, Presiding Justice of the Third Department of the Appellate Division of the Supreme Court, and a convention committee chairman, attacked the "odious" federal committee headed by "Black with his white pillow case and his white sheet."²⁰ He charged the Democrats with having introduced the proposal under consideration as a "smoke screen, to cover up the odium that is attached to the National Administration."²¹ Referring to the vote by which his party had gained a majority of the convention delegates, he concluded that it signified that "the people of the State of New York do not like these New Deal crackpots to write us a Constitution. (Applause)"²²

Many of the propositions submitted to the convention

¹⁹ See his speech on the searches and seizures proposal (*Record*, pp 395-405). Over one hundred and fifty pages of debate on this question exhibit all too clearly the degree to which a constitutional convention can "go" political. (See particularly *Record*, pp. 451-453; 456-457; 493-509, 512-521, 605-606; 609-611)

²⁰ *Ibid.*, p. 610

²¹ *Ibid.*, p. 611.

²² *Ibid.*, p. 612 Delegates Duane H. Bruce and George H. Fearon, both committee chairmen, also took the national administration to task in this debate. (*ibid.*, pp 495-497, 509) See also the open attack of James L. Dowsey, Sr., chairman of the committee on counties, upon the New Deal as represented by Senator Wagner's slum clearance and "sun-

were designed either to embarrass the opposition or to obtain special advantages for the party or the proposer. Others, less explicitly political, were turned to partisan advantage by clever engineering. A brief review of a few measures of this type may be germane to our inquiry.

The reapportionment amendment was so obviously a partisan measure that a substantiation of this claim need hardly detain us. Lack of legislative redistricting since 1917, despite the rapid growth of population in the metropolitan area, has produced a condition in the state in which New York City with roughly fifty-five per cent of the population elects only forty-one per cent of the assemblymen and forty-three per cent of the senators. Rural up-state is over-represented in both houses of the legislature. The amendment as finally passed aggravated this disparity by adding nine assemblymen, six of whom were assigned to up-state Republican counties. At one point in the consideration of this amendment Senator Wagner pleaded for an extension of time so that the Democratic members of the reapportionment committee could examine it closely. "I have been told by some members of the committee that this morning they saw the bill for the first time; they are not informed of just where it came from." Whereupon, majority leader Pitcher rejoined: "I will tell you where it came from. It was drawn in my office last evening. That settles that."²² The Republican delegates never refuted the charge made repeatedly on the convention floor that the reapportionment arti-

shine settlement' program. He referred to it as "swashbuckling loaning of money . . . with typical New Dealian regard for the man who pays the bills." (*The New York Times*, May 5, 1938.)

Ex-Senator Fearon, following an attack by Senator Robert F. Wagner on the Republican reapportionment measure as unfair, bitterly berated Wagner: "This is too much, Mr. Chairman, when the author of the National Labor Act gets up and talks about fairness. God forbid that he should be any judge of the meaning of that word." (*The New York Times*, August 18, 1938.)

²² *Record*, p. 1128.

cle was written by State Chairman Murray and New York County Chairman Kenneth Simpson.²⁴

Further evidence that constitutional conventions have very earthy roots was furnished by the Republican majority, when it proceeded to write into the state's organic law another provision having little to commend it but partisan advantage. This proposal was sponsored by Kingsland Macy, Republican Chairman of Suffolk County and chairman of the convention's committee on civil service. It sought to erect an additional state judicial district to be made up of Nassau and Suffolk counties. The purpose of this proposal was to remove these counties from the second judicial district which was completely dominated by Democratic city counties (Queens, Kings and Richmond). The new district was to be number ten. The motives of Macy, political leader of a solidly Republican county, were quite plain, though he based his arguments on grounds of economy, geography and convenience.²⁵ This measure was taken up twice by the Republican-controlled judiciary committee and defeated each time: the first time unanimously, the second time by the margin of one vote.²⁶ To circumvent its reversals in com-

²⁴ *Ibid.*, p. 2968. On the advice of Alfred E. Smith, the Democrats did not draft a reapportionment measure of their own. Smith argued that the best political strategy was to attack the Republican bill at the polls in November, he promised to take the lead in the fight himself (W. A. Worn, *The New York Times*, July 22, 1941).

While the stage was being set for the passage of the reapportionment measure, Republican delegates and party leaders toiled openly to entice Negro voters in Harlem to abandon Tammany leadership, promising in return the erection of an all-Negro assembly or senate district in Harlem (*ibid.*, May 2, August 6, 1938). See also the resolution introduced by William S. Bennett, Republican delegate from New York City, declaring it to be the desire of the convention that Harlem Negroes be so treated (*Record*, p. 68.)

²⁵ *Ibid.*, p. 1940. In 1931 a similar proposal, submitted to the people as a constitutional amendment, met with defeat.

²⁶ *Ibid.*, p. 1962. Judge Harlan W. Rippey, Democratic delegate from Rochester and member of the Judiciary Committee, attributed its better

mittee, Macy was forced to offer it from the floor during a session of the Committee of the Whole as an amendment to the judiciary article (Introductory 691). Openly cynical Democratic opposition destroyed his best arguments by pointing out that judiciary business in Nassau and Suffolk was so slack that in 1937 two of their judges had been assigned to Brooklyn and Queens.²⁷ Republican delegate Dowsey of Nassau County laid bare his party's motives in this matter by complaining about the small number of Republican lawyers receiving appointments in Nassau or Suffolk as receivers or referees.²⁸ Democratic opposition was best summarized by Benjamin C. Ribman, Brooklyn Democrat, who remarked, "There was involved here solely a political question, a desire on the part of . . . the Republican leaders of Nassau and Suffolk, to control every job in those two counties, and to take the only three remaining jobs they have thus far been unable to get."²⁹ Nevertheless, the amendment was passed by the convention.³⁰ An attempt later by Democrats to strike out this amendment was defeated by a vote dividing almost perfectly along party lines. The Republican party in the convention used its majority to further political advantage in thwarting the minority's effort to modify the report of the suffrage committee. The debate on this question not only provides evidence of party politics in the convention, but also displays the cohesion present in party ranks when an issue involves straight political strength—a cohesion often lacking in the face of social and economic issues. Delegate Francis D. McGarey,

showing on the second committee ballot to the fact that "somebody had been seen" (*ibid.*). W. A. Warn, in *The New York Times*, wrote that J. Russell Sprague, Republican leader of Nassau, not a delegate, "has been camping on the convention doorsteps ever since the Macy amendment has been under consideration" (August 3, 1938)

²⁷ *Ibid.*, pp. 1944, 1945, 3131.

²⁸ *Ibid.*, p. 1946

²⁹ *Ibid.*, p. 3130.

³⁰ *Ibid.*, p. 1963

³¹ *Ibid.*, p. 3132-3133

Brooklyn Democrat, was more frequently to be found voting with conservative rural Republicans on social questions, but no more loyal Democrat could be named when a purely party measure was at stake. As many others before him, he distinguished "job politics" from "policy politics." It was he who led the fight to amend the report of the suffrage committee. His motives were political; his opposition was equally politically inspired.

An old constitutional provision requires four months residence in a county before a citizen is eligible to vote. McGarey moved an amendment eliminating this limitation in those instances where a city contained more than one county. Pointing to New York City with its five counties and a population given to moving frequently from one part of the city to the other, he complained that the four month restriction resulted in the disenfranchisement of many voters.⁴² His amendment received the immediate objection of Mrs. H. Z. M. Rodgers, chairman of the suffrage committee, who realized that Mr. McGarey's concern was for good Democratic votes. She based her protest on grounds of uniformity, pointing out rather lamely that voters in rural areas also were known to move from county to county.⁴³ McGarey then agreed to withdraw his amendment if Mrs. Rodgers would be consistent and follow the principle of uniformity throughout the state. He was refused with the words, "I believe in uniformity in fundamentals but not in incidentals. (Laughter.)" ⁴⁴ The significance of this remark was made apparent in the debate immediately following on the question of permanent registration.

New York City by statute operates under a system of personal registration. A great part of rural upstate is permitted permanent registration. Doubtless, the inconvenience of annual personal registration diminishes the number of actual Democratic voters in New York City.

⁴² *Ibid.*, p. 2456.

⁴³ *Ibid.*, p. 2457.

⁴⁴ *Ibid.*

McGarey offered amendments providing for uniformity throughout the state. He was willing to accept either compulsory personal registration or compulsory permanent registration if it were applied to the state as a whole. Proposals to this effect had been defeated earlier in committee by a straight party vote.⁸⁵ After an acrimonious debate, in which Democrats charged that Putnam County had a registration of one hundred and two per cent of its total population,⁸⁶ and Republicans replied that the relation between registration and population in the city of Albany was eighty per cent, the Democratic proposals were rejected, again by a party vote.⁸⁷ In view of the fact that the Republicans had pleaded uniformity when it suited their purposes and denied it when it didn't, one may conclude that their opponents held the more justifiable position. However, the point of emphasis here is not the validity of claims and counterclaims but the partisan attitude pervading the deliberations.⁸⁸

The Republicans, because of their control of the convention, were more successful than their opponents in securing the passage of measures for partisan profit. But the Democrats were by no means guiltless; specific proposals were introduced, amended or blocked because of consideration for party welfare. Led by John T. Dooling, secretary of the Tammany Hall law committee, New York City Democrats succeeded in perpetuating in office until 1941 the useless county officers in New York City. This was accomplished by amending the home rule article so as to prevent the New York City Council from taking advantage of a 1935 constitutional amendment permitting it to abolish such county officers.⁸⁹ Enough upstate delegates opposed to home rule combined with Tammany Democrats to secure the required majority. In another

⁸⁵ *Ibid.*, p. 2465.

⁸⁶ *Ibid.*, p. 2461.

⁸⁷ James C. Hagerty, *The New York Times*, August 10, 1938.

⁸⁸ See particularly pp. 2456-2468 of the *Record*.

⁸⁹ *Ibid.*, pp. 1915-1916.

instance Tammany Hall, allied with the Kelly and Flynn organizations in Brooklyn and the Bronx, blocked a broad proposal which would have forced public officials "in any lawful inquiry, investigation, trial or proceeding" to appear as witnesses against themselves under penalty of losing office. This group, supported strongly by judicial delegates, succeeded in limiting the applicability of this provision to grand jury proceedings only. Judge Francis Martin of New York City, who introduced the restricting amendment, objected to "investigations where the investigator will first send for the newspapers, and then when the public official comes in, try to crucify him."⁴⁰ Coming at the moment when Thomas E. Dewey was successfully impeaching the record of several Tammany organization leaders, Judge Martin's words probably reflected the sentiments of many New York City Democrats. The vote on Martin's amendment found only three Democrats voting against the party.⁴¹

Occasions also arose when party organization delegates ceased inter-party warfare and joined forces to obtain political advantages of mutual benefit. The most noteworthy coalition of this character was effected during the closing moments of the convention and produced the constitutional amendment banning proportional representation in New York State. In an earlier discussion of the suffrage committee's report (August 9) it was pointed out that four proposals to ban proportional representation had

⁴⁰ *Record*, p. 2660

⁴¹ Wagner, Poletti and Kuczwalski (*The New York Times*, August 12, 1938) "The debate today carried with it more under-the-surface politics than any other proposal which has been brought before the Convention" (Warren Moscow, *ibid.*)

Another example of a strictly partisan proposal is Introductory 97 by Mr. McGarey, spokesman for the Kelly organization in Brooklyn, which would have barred any one voting in a party primary from signing an independent nominating petition for any office which was at stake in the primary. The change, if made, would have been a great help to party organizations, making independent nominations much more difficult. (Warren Moscow, *ibid.*, April 27, 1938.)

been defeated in committee by a vote of sixteen to one.⁴³ Notwithstanding this evidence of opposition, Louis M. Killeen, Republican delegate from Schenectady, just as the suffrage measure was about to be passed, introduced an amendment thereto prohibiting the conduct of an election to public office "by any system of proportional representation."⁴⁴ The debate which followed this step showed quite clearly that a coalition of New York City Democrats (bitterly opposed to "P. R." in that city) were receiving the support of a group of upstate Republicans. New York City Republicans (Phillip J. McCook, Harold Riegelman, Abbot Low Moffat and Joseph C. Baldwin) aided by the chairman of the suffrage committee, Mrs. Rodgers, were the only voices raised in opposition. Mr. Moffat charged that:

this is frankly a political amendment, and I hope that it will not prevail. . . . I understand a great deal of the support of this proposal from my colleagues upstate is because they do not want this system extended to the upstate regions. But we in New York City have adopted this system, and I think we should not by constitutional amendment destroy that which the people themselves adopted by an overwhelming vote . . . I beg my upstate colleagues not to play into the hand of Tammany Hall and the Democratic organization, who obviously do not want this in the City of New York. . . .⁴⁵

But the amendment prevailed. To a man, the Democrats voted solidly for it and were joined by thirty-six upstate Republicans.⁴⁶ According to *The New York Times*, "a persistent rumor circulated through the convention chamber that some Democrats and up-State Republicans had reached an agreement whereby these Democrats would vote against the Health Insurance provision of the Social Welfare article in return for Republican support

⁴³ *Record*, p. 2478. ⁴⁴ *Ibid*, p. 3284. ⁴⁵ *Record*, pp. 3288, 3292.

⁴⁶ *The New York Times*, August 20, 1938. The vote was 96 to 35. (*Record*, p. 3290.)

of the 'P. R.' amendment."⁴⁸ Inasmuch as only four Democrats voted against health insurance, the "deal," if such it were, was not carried through to completion. However, enough up-state, local Republican organizations were alarmed by recurring attempts to introduce "P. R." in their localities to provide Tammany with sufficient support to eliminate this danger to party organization monopoly over local government. This was political horse trading on a plane certainly no higher than legislative log-rolling.

The preceding pages have been devoted to sample instances in which the major parties used the constitutional convention for immediate partisan purposes. In organizing the convention, in dispensing patronage, and in sponsoring specific party proposals the Democratic and Republican parties, at times opposing one another, at times collaborating, were swayed by consideration of "job politics." Viewing the convention's labors as a whole, however, we find that a great many questions were debated which fall within the general field of "policy politics." In this sphere are to be found broad social and economic issues of major significance to the public at large. It is in their treatment of these questions that political parties establish the record upon which largely they rise or fall in the game of winning control of the government. Here their major energies are expended. To achieve a realistic interpretation of the constitutional convention, its procedures, accomplishments and implications, it is necessary to consider the treatment accorded some of these issues. In conception and debate, were they handled "constitutionally?" Did the motives and contexts from which they stemmed differ essentially from those which impel legislative action? Or do constitutional conventions react as legislative bodies react when confronted with major issues of the day?

⁴⁸ August 20, 1938.

CHAPTER V

PARTY STRATEGY AT THE CONVENTION

No scientific evaluation of the proceedings of the constitutional convention can be achieved unless it is related to the political context of the times in which the convention labored. Party strategy is a product of the times and is guided by the issues which at the moment are capable of stirring the electorate. At the same time, the issues of the day are to a great degree influenced by the strategy of the parties. This interaction of party politics and public questions is a constant feature of American legislative assemblies; it was also a characteristic of New York's 1938 convention.

The position is taken at the outset that the desire to promote the welfare of the party, of the political faction, or of the individual was one of the basic forces affecting the course of the convention. To buttress this assertion with proof is in some instances simple, in others, difficult. In the broad field of "policy politics" political maneuvering is difficult to trace: appeals to vague concepts of public welfare, temporary bloc rebellions within parties, and frequent uncertainty on the part of party leaders as to which course to follow often shield the sources of motivation and complicate attempts to expose the underlying patterns of political strategy. Another difficulty in achieving this objective arises out of the fact that much of the important work of the convention was done in committee of the whole. Here the most vital amendments to committee reports were discussed and voted on. Here the most important divisions within and between parties took place. Unfortunately, the *Record* contains little information as to how individual delegates, or parties as a whole,

voted on these amendments. Not until the last two days of the convention were roll calls taken on votes in committee of the whole. Only the final vote (and often this is of less significance than earlier action) is recorded in detail.

Nevertheless, unadulterated political jockeying was sufficiently prevalent during the sessions to crop out repeatedly in the speeches of the delegates. In addition, the *Record* is supplemented by the writings of seasoned journalists who reported at length their impressions of what actually transpired. Enough evidence, therefore, can be adduced to substantiate the major thesis of this chapter. As a preliminary outline, it may be stated that our objective will necessitate an analysis of party strategy, inter-party disputes, and intra-party warfare (which entails emphasis upon rural-urban differences, the composition of convention personnel, and the whole problem of party leadership).

As a result of the election of November, 1937, the Republicans found themselves with a comfortable majority in the approaching convention. Having grown accustomed to defeat in state-wide elections, they were amazed at the degree of their success, a success which may be attributed largely to (1) the LaGuardia landslide in the New York City mayoralty race, (2) the refusal of the American Labor Party to endorse all the Democratic candidates for delegate-at-large, and (3) the foresight of the Republican Legislature of 1917 which carved out the senatorial districts in such a way as to favor the up-state counties. The Republicans were surprised, pleased, and relieved. Before the election their chief concern had been the prospect of a thorough state legislative reapportionment by a Democratic-controlled convention. The major crisis was now over. On the other hand, the Democrats may not have been completely heartbroken over losing control of the convention. Dear as reapportion-

ment was to them, the responsibilities inevitably accompanying majority leadership might have proved embarrassing, particularly since a sizeable bloc of anti-New Deal Democrats within the party had representation in the convention. Responsibility without clear-cut control was less to be desired than the status of minority party. From the latter position, sniping tactics might be employed very profitably to annoy the party charged with responsibility for the entire work of the convention.

Neither party approached the convention with any particular program. The major issue dividing them before the election—reapportionment—had for all practical purposes been decided by the voters. The Republicans had won. What was to come later would be to the party leaders only anticlimactic; suitable policies to deal with other issues would be dictated by the urgencies of the moment. It was partly for this reason that the leadership of both parties on the eve of the convention found it easy to subscribe to the mythology of American constitutional conventions by disclaiming any intention actively to intervene to influence the course the delegates would take in their deliberations. If one would possess the key leading to fuller comprehension of party activity during the convention, one must look not to previously announced pledges, but to the approaching November, 1938, election and to the general political situation in which each party found itself.

Because of overwhelming Democratic strength in New York City, the Republicans have been unsuccessful in elections for statewide officers since the victory of Governor Nathan L. Miller in 1920. The popularity of the New Deal program did much to augment the normal Democratic majority in the state. During this period the Republican state organization, aware of the liberal trend of the times, followed the policy of only half-heartedly fighting the more extreme measures of their opponents,

and in the end generally accepted the popular features of the Democratic program. It was high time, in the opinion of many Republicans, to cease being tied to the tail of the Democratic kite. Perforce, a Republican liberalism must be born, a liberalism independent of Democratic inspiration. Why not take advantage of the providential opportunity presented by the clear-cut Republican majority in the constitutional convention? What better sounding board could be devised to test the popularity of a revised Republican approach to the problems of the day? Therefore, though the party had ridden to power on no specific platform, it was no secret that the Republicans hoped "to make the Constitutional Convention their proving ground for issues in the State campaign this Autumn."¹ There were some who even hoped that from the convention a man would emerge who would prove of sufficient stature to become a leader in the gubernatorial campaign.²

The Republican problem, therefore, was to assume the mantle of liberalism so as to increase the party's following among urban voters. But this must be accomplished without antagonizing conservative up-state supporters—a task requiring an ingenuity Republican leaders had been innocent of for many years. The Democrats, on the other hand, since the first administration of Alfred E. Smith, could point to a fairly consistent record of liberal performance. Happily shorn of responsibility for the convention's work, though still the majority party in the state, the Democrats found it obviously to their advantage to rely chiefly on a policy of obstruction. If successful, such a policy would damage the reputation of the opposition leadership now making a bid for control of the executive offices of the state. Further, if carefully engineered, it would expose the inherent conservatism of large

¹ W. A. Wain, *The New York Times*, April 5, 1938

² *Ibid.*, This was especially true of those county leaders not yet thoroughly convinced of the "availability" of Thomas E. Dewey.

segments of the Republican party's following. The latter objective was perhaps the most consistent aim of the Democratic leadership during the course of the convention. But, in matters of detail, the programs of both parties were *ad hoc*, fashioned by the political forces of the moment and finding common roots in the desire to win public support.

Despite their numerical inferiority, the Democrats, during the first three months of the deliberations, were more successful at this sort of political in-fighting than were their opponents. This may be attributed partly to a more aggressive and purposeful leadership. Though the Democrats were by no means strongly united, they faced an opposition whose leadership on many occasions was either routed by factional controversy or was uncertain as to the wisest course to take. Not until the last month did Republican leaders get matters sufficiently in hand to thwart the methods of their opponents.

In a surprise speech to the delegates the second day of the convention, minority leader Robert F. Wagner provided a clue as to Democratic strategy. Referring to Judge Crane's opening speech affirming the convention's faith in the American bill of rights, Wagner warned that "only by promoting democracy in the economic order, democracy in the political order can endure. . . . The problem of the day is to meet the threat to freedom that comes from another source—from poverty and insecurity, from sickness and the slum, from social and economic conditions in which human beings cannot be free."²

There was a strong flavor of New Deal philosophy in this keynote address and it preceded by only a few moments a flood of very liberal Democratic proposals for constitutional change. Of the first forty-five proposals submitted to the convention, not more than half a dozen

² *Record*, pp. 34-35.

bore the names of Republican sponsors.⁴ Among the Democratic measures were bills prohibiting unreasonable searches and seizures, authorizing various housing and slum clearance projects, authorizing lotteries the proceeds of which were to be used for relief or housing purposes, providing for constitutional amendment by popular initiative, establishing a state "consumers" department, providing additional constitutional protection for labor, granting all persons without regard to race, color, religion or creed equal protection of the laws, creating an integrated department of justice, and repealing the constitutional limitation upon the legislature's power to legalize gambling.

The tactics of the minority were both patent and successful. By introducing fairly popular liberal proposals and then publicizing threats to discharge hesitant Republican committees, the Democrats immediately put the majority party on the defensive, forcing it to justify its opposition to proposals for which the Democrats would get the credit. Moreover, the nature of some of these measures was calculated to arouse the instinctive conservatism of many up-state Republicans, revealing to the voters the tenuousness of Republican liberalism and plaguing those leaders desirous of associating the party with an independent liberal program. The frequent and often violent disputes within the Republican party occasioned by some of these bills attest the success of Democratic strategy.

The debate over the searches and seizures proposal affords a typical example of an early move by Democratic leaders to place the opposition in an embarrassing political position. There were eight bills submitted on this question—all by Democrats—but in the end the minority party concentrated on Senator John Dunnigan's proposal

⁴ W. A. Wam, *The New York Times*, April 20, 1938.

(Introductory 104). His bill called for the prohibition of unreasonable searches and seizures and provided, further, that information obtained illegally could not be introduced as evidence in the courts. It was at once dubbed the "wire-tapping" bill. Introduced without fanfare, its potentiality for whipping up a political backfire was underestimated by the Republicans who by an almost solid party vote defeated it in committee.⁵ At once Senator Dunnigan charged that the Republicans were disregarding individual rights and pointed out the inconsistency of their stand in the light of their attacks upon the national administration. The reluctance of the Republicans to approve of this measure must be viewed in terms of Thomas E. Dewey's successful exposé of the political racketeering of certain Tammany leaders in New York City. The passage of the Dunnigan proposal not only would limit the freedom of action enjoyed by Dewey, but also might be construed as a repudiation of his activities. This would be a serious blow to those planning to draft Dewey as the Republican candidate for governor in the coming election. On the other hand, if, as the minority expected, the Dunnigan measure were blocked by Republican opposition, excellent campaign material would be provided against the very party which for years had denounced New Deal techniques as violative of the federal bill of rights.

The action of the Republicans in killing the measure in committee proved to be poor party strategy. Had the committee reported the measure out to the convention floor without recommendation, the political storm which developed might have been averted. The Democrats were now in a position to launch a prolonged and bitter attack upon the perfidy of those strongly championing civil rights only when it was politically expedient to do so.

⁵ *Record*, p. 395. George Fearon was the only Republican voting for it.

Dunnigan served notice he would move to discharge the committee and pleaded with the Republicans to rise above party politics in this matter.⁶ The important political significance of the issue under debate was emphasized when party leaders brought both Governor Lehman and Thomas E. Dewey publicly into the arena. The former sent a formal message to the convention strongly urging the acceptance of the principles of the Democratic measure.⁷ Dewey, speaking before the New York State Association of District Attorneys, attacked that part of the bill prohibiting the introduction into the courts of illegally obtained evidence. He warned that it would merely strengthen the hands of criminals.⁸ Fearful of the political effect of the Democratic offensive, the Republican leadership decided to report the Dunnigan proposal out of the convention without recommendation, thereby forestalling a vote on the Democratic motion to discharge. At the same time, the bill of rights committee submitted to the convention an alternate and compromise measure interdicting unreasonable searches and seizures but omitting any reference to judicial use of illegally obtained evidence. Thomas E. Dewey participated in the formulation of this bill which became known as the "Dewey-Lewis" measure.⁹

The debate on the two bills covers almost one hundred and fifty pages of the convention record. It was strictly partisan and very acrimonious. The only Republican of note straying from the party line was Senator George Fearon who insisted that he did "not propose to let mere political expediency sway my judgment on a matter of

⁶ *Record*, p. 396.

⁷ *Ibid.*, pp. 372-376

⁸ *The New York Times*, June 12, 1938. This was the only part of Introductory 104 on which the parties were split. There was little opposition to a constitutional amendment simply prohibiting unreasonable searches and seizures.

⁹ *The New York Times*, June 19 and July 11, 1938.

grave political principle."¹⁰ In the end the weight of Republican numbers secured the defeat of the Dunnigan proposal and the acceptance of the committee's substitute. But not until the majority leadership had received a serious jolt. It was evident that the better integrated Democratic forces were prepared to make political capital out of every opportunity.¹¹

The success of Democratic methods, particularly during the first months of the convention, may be attributed to the comparatively greater effectiveness of that party's leadership. Party conferences were held periodically, and on many matters a party policy was decided upon and adhered to. But it was the constantly recurring internecine warfare suffered by the opposition which made smoother the path of the Democratic party. Factional strife was by no means absent within the Democratic ranks. The conflict between Senator Wagner and ex-Governor Smith was nearly always in evidence. New Deal and anti-New Deal Democrats frequently burst into verbal battles on the convention floor. Tammany sometimes split on social questions, but Mr. Smith could always rely on a minimum of eight or ten anti-New Deal Democratic votes, sufficient at times to control many important decisions.¹² As early as May 9, Senator Wagner was laboring to weld his party together sufficiently to assure a united front in dealing with the economic issues before the convention.¹³ So sharp was the conflict on questions of social principle that

¹⁰ *Record*, p. 498

¹¹ The Democrats utilized a similar technique in their treatment of the labor and power issues. Highly publicized threats to discharge Republican committees of rejected liberal Democratic proposals compelled the majority to report out the same or alternative measures. The ensuing debates painfully revealed the fundamental cleavage between liberal and conservative Republicans.

¹² Warren Moscow, *The New York Times*, August 20, 1938. Among Smith's supporters were James A. Foley, Eugene Garey, Francis Martin, Adrian Burke, John T. Dooling, and Murray Stand.

¹³ *The New York Times*, May 10, 1938.

his hopes were never fully realized. Only because the Democratic insurgent bloc was smaller than the Republican one is it possible to conclude that the minority party was better organized and its leadership more effective.

The fairly successful Democratic policy of obstruction and embarrassment threatened to reach its peak during the last month of the convention's work. It was thwarted only by the success of liberals and vote-conscious conservatives who combined to pass several socially desirable constitutional amendments. On August 1, it was reported that some Democrats believed their party had erred in forcing its opponents to report such measures as water power and labor to the convention, questions on which the Republicans had made initial errors by defeating them in committee. These Democrats did not want their opponents to present any really popular issues to the voters in the approaching elections. In this way the Democrats could campaign against the "Republican Constitution," emphasizing the failure of the majority to come to grips with the major problems of the day.¹⁴ Hence, they held, the party should make no effort to press for social reform. So strong was the belief that the Democrats were toying with this idea that *The New York Times* felt compelled to publish an editorial condemning it as "dangerous" and admonishing the Democratic leadership that so much was at stake for the whole state that "There ought to be no talk of holding back and no thought of sabotage."¹⁵ This policy, if it were ever seriously contemplated, was abandoned before reaching fruition. The action of the convention in adopting several liberal and popular constitutional amendments stayed the hands of those Democrats who may have entertained any thought of resorting to obstructive tactics of this extreme character. On the whole, however, they followed a fairly consistent political

¹⁴ Warren Moscow, *The New York Times*, August 1, 1938.

¹⁵ August 2, 1938

course throughout the convention. Relieved of responsibility for the convention's accomplishments (or lack of them), it was to their advantage to harass the majority party at every step. And in so doing, they took especial pains to execute maneuvers laying bare the factional discord within the ranks of their opponents as well as the strong conservatism governing the politics of a large body of Republican supporters. At the conclusion of the convention's labors, the Republicans were unable to point to a consistent record of liberal performance on the part of even a majority of their delegates. For then the convention failed to provide the forum from which a new Republican liberalism was to emerge.

The essential difficulty of the Republican party's position was aggravated by a number of factors. (1) It was compelled by force of political circumstances to try to achieve a reputation for independent liberalism—and this in the face of the presence within its own membership of an important body of conservative voters. (2) Its leadership was handicapped by the political power and independence of many Republican county leaders (long accustomed to semi-autonomy within their own districts), many of whom were delegates to the convention. These county leaders have never been as subservient to a centralized state leadership as have the Democrats. (3) As majority party, it was responsible for a record of positive accomplishment, a position requiring powerful and sagacious leadership and coordination within the party. (4) It was forced to contend with a clever and better integrated opposition which could rest on its record of past liberal achievements and concentrate on a strategy geared to embarrass political opponents. (5) And, finally, during the very months under review the leadership of the state Republican committee was in doubt; a quiet struggle was going on to deprive Chairman William Murray of actual if not nominal control of the party.

As a result of these conditions the Republicans, especially during the first three months of the convention's work, suffered several reverses. They were outmaneuvered on the issue of searches and seizures. On the question of labor they were equally inept: Senator Dunnigan scored an early victory over them by formally sponsoring the fifteen point convention program of the A. F. of L.¹⁶ The Republican-controlled committee on industrial relations, with singular short-sightedness, first killed all proposals submitted to it increasing the constitutional rights of labor; then, realizing its error, the committee finally reported out a substitute measure which encompassed many of the principles it had at first rejected. Almost the same procedure was used in mishandling the power issue: a Republican committee rejected a proposal preserving for the state all natural water power sites, but was later compelled by force of public and editorial outcry to submit to the convention the very measure it had buried.

Efforts to provide more astute Republican leadership were made from time to time but were generally unavailing until the convention's closing weeks. Once the convention patronage was distributed, a pretense was made of subscribing to Chairman Murray's pre-convention statement that the state committee would abstain from intervention, and that the people's delegates should be permitted to act as their consciences might dictate. This policy led to so many politically unpromising situations that attempts were made very early to set up some sort of policy-forming committee. Reluctant to flaunt openly Murray's promise of political non-intervention, it was suggested at first that such a committee be "unofficial" and be composed only of Republican delegates. Its main duty was "to advise the Republican delegates . . . on proposals relating to Republican doctrines" so that "a

¹⁶ *The New York Times*, April 27, 1938.

definite Republican program will be drawn up and its principles incorporated into a new State Constitution." ¹⁷ This move was checked almost before it began. It was reported that it "had not made a hit with a majority of the Republican delegates." ¹⁸

Finding themselves often outsmarted as the convention wore on, the Republicans about the middle of June revived the idea of a "steering committee." ¹⁹ After being discussed for several days, the proposal was dropped. Instead, it was decided to establish a less rigid and less powerful party "conference." Where caucus action would bind all participants, the decisions of a conference left each delegate free to vote as he wished ²⁰ It would be useful, it was hoped, as a means of obtaining at least informally some uniformity of party action. The first conference was held on June 27, and thereafter conferences were generally held prior to convention debates on major issues. ²¹ Beginning about the middle of July, Republican fortunes improved noticeably. To a certain degree this may be attributed to the functioning of the conference method of leadership. However, it was a precarious sort of leadership, attacked at intervals by Republican delegates themselves. For example, in the debate on the question of health insurance, the party split wide open. Republican delegate Hamilton Fish openly voiced his suspicion that a Republican "steering committee" had turned thumbs down on the proposal and had forced party delegates to vote against it. He added, "I am opposed to any steering committee and have opposed it. This is not the only bill . . . they are operating on. and I resent it very much. . . ." ²²

¹⁷ *Ibid*, May 2, 1938

¹⁸ W. A. Warn, *Ibid*, May 3, 1938

¹⁹ Warren Moscow, *ibid*, June 17, 1938.

²⁰ W. A. Warn, *Ibid*., June 23, 1938

²¹ See *ibid*., June 28, July 1 and July 2, 1938.

²² *Record*, p 2235.

These words, reflecting a sentiment held by many delegates attending the convention, emphasize the major problem which confronted leaders of both parties—that of securing obedience from rank and file followers. Several interesting questions arise from this situation. Why was leadership such a tenuous proposition? Was it less or more effective than that normally in evidence during regular legislative sessions? Was it the result simply of a combination of political forces and factors coinciding with the New York convention? Or were the elements favoring insurgency indigenous to the very process and functioning of all constitutional conventions? The answering of these questions should throw considerable light on the fundamental problems of constitution-making.²³

The basic factor rendering difficult the task of the party leaders, and one which inevitably appears whenever representative bodies convene, is the presence within both parties of sectional, economic or ideological blocs. The Democrats suffer less from this than do the Republicans. Drawing its principal support from the New York City metropolitan area and from the cities of Buffalo and Albany, the Democratic party, geographically speaking, has a fairly homogeneous following, a condition which makes for some degree of party unity. (Moreover, as members of the "in" party in the state and in the nation, the Democratic leaders through a judicious exercise of patronage powers are able to offer powerful inducements to preserve regularity. As a consequence, potential economic and ideological differences remain more deeply submerged.) The Republicans on the other hand find greater cause for irregularity. Geographically speaking, the Republican party is more heterogeneous, with its im-

²³ It is important to keep in mind that the problem of leadership became acute only in matters relating to "policy" politics. Whenever the convention touched even remotely questions of "job" or "organizational" politics, the leaders could generally rely on full party strength.

portant rural support spread over the entire state and with its almost equally valuable urban following found in New York City and most of the cities of the hinterland. The sectionalization of its followers makes for greater divergences along economic and philosophic lines.

The record of the convention is shot through with evidences of the fundamental cleavage the Republican party suffers in New York State. This cleavage is sometimes a rural-urban one but usually takes the form of an upstate-downstate split. The party was divided, and often violently, on issues such as the prohibition of proportional representation, local finances, home rule, earmarking of gasoline taxes, labor relations, housing and social welfare. For a time intra-party differences even threatened to break out over such a purely political issue as reapportionment. The debate on the social welfare bill portrays, perhaps better than any other, the lack of unity among Republicans on questions of fundamental economic significance. This measure was sponsored by a Republican-controlled committee whose chairman was Edward F. Corsi, liberal Republican from New York City, and it contained a permissive provision empowering the legislature to pass laws dealing with health insurance. Led by delegates Imrie, Barnum, Stuart and Fearon, the up-state Republican bloc made a determined effort to eliminate this feature of the social welfare bill. The argument was bitterest when the antagonists were Republicans of opposite views. Hamilton Fish's speech warning up-state Republicans of the political danger of their move clearly depicts the split within his party and, at the same time, recalls to mind our major thesis that party politics was a prime element of the convention. Remarking that the opinion of those urging the defeat of health insurance "represents the philosophy and the ideology of many up-state Republicans and of many other conservatives and reactionaries throughout our country," Fish added:

And I say to my fellow Republicans from the northern part of this State, who know little about the conditions in the factories, mills and mines, who have no contact with the wage earners in the great big cities, that if our party goes on record against social reform these days, there will be no more Republican party worthy of its name . . . if we refuse to vote for social and industrial justice and a square deal for labor and for proper social reforms, we will be denominated and justly so as the enemy of labor . . . if we continue to hamper and impede legislation of this kind, . . . I doubt in the next election whether we will even carry Maine and Vermont. (Laughter.)

But I say to you Democrats that all we have got to do is to go down the middle of the road, on the one side, opposed to class hatred, radicalism and Communism and on the other side opposed to reaction and demonstrations of special privilege, merely go down the middle of the road of a square deal for labor, for the wage earner, for the farmers, for business, for private property under the confines of our American system and the Constitution of the United States, and the Republican party will sweep this nation.²⁴

Fish's address was frankly political in tone and content. He went out of his way to chide his up-state colleagues for their conservatism, not so much for philosophic reasons, but because along such a course lay political ruin for the party. The Democrats, of course, were delighted at the turn the debate took, while up-state Republicans squirmed at Fish's scolding. Nor were the latter silent. Senator Fearon declared that the major trouble with the Republican party was "gentlemen like him, getting up and attacking his party. . . . Just because the up-state Republicans will not go as far as the Congressman will, that is

²⁴ *Record*, pp. 2216-2219. In answering this attack, Jerome Barnum, Republican delegate from Syracuse, appealed to the sectional interest of upstaters and asked for a repudiation of health insurance (*ibid.*, p. 2246). It is interesting to note that of the twelve votes cast in the American Congress against the National Social Security Act, eight came from Congressmen from upstate New York.

no reason why we should be written out of the party." ²⁵ Fish retorted that the Republican party had failed for many years to carry New York State in the gubernatorial elections "And why? Because of the leadership of such men as Senator Fearon." ²⁶ Although divergences of economic views are found among Republicans attending sessions of the state legislature, they are rarely publicized as openly as this.

The Democrats also found it impossible to escape internal disaffection. Their differences were ideological and grew out of the fundamental cleavages of opinion wrought by the philosophy of the New Deal. Mention has already been made of Governor Smith's faction which was often found on the conservative side of divisions on economic issues, and was always prepared and eager to attack the national administration on the least provocation. The most severe critic of the New Deal among the Democrats was Robert E. Whalen of Albany who went as far as to urge the passage of a resolution transmitting a copy of Governor Lehman's message on searches and seizures to Mr. Justice Hugo Black, "he having been chairman of an investigating committee of the United States Senate which seized and impounded, without warrant, private papers of citizens, notwithstanding the guarantees of the Fourth Amendment." ²⁷ Whalen's sharpest criticism of the New Deal appeared in the form of a bill designed to enlarge the power of the judiciary to review administrative rulings. This bill, passed at the convention, was looked upon as a direct slap at Roosevelt. ²⁸

Alfred E. Smith on several occasions seized opportunities to attack the New Deal, directly or by implication. In his remarks on grade-crossing elimination he wondered how

²⁵ *Ibid.*, pp. 2223-2224.

²⁶ *Ibid.*, p. 2234.

²⁷ *Ibid.*, pp. 391-392.

²⁸ See *The New York Times*, August 14, 1938.

one could "defend the attitude of the government at Washington in throwing billions of dollars around the way we used to throw sawdust on the old barroom floor. . . ." ²⁹ Debating the bill on conservation, he launched a personal attack on Roosevelt, asseverating that his handling of the conservation issue in 1931 while governor of New York had been unwise as well as autocratic. "I can tell it to you, some of the leaders of my party that did not understand what it was all about, and would not know it from a rubber boot, decided that the best thing to do was to stand by the Governor, because he had something yet to hand out." ³⁰ Neither Smith nor the group he led overlooked any occasion to take pot-shots at minority leader Robert Wagner and the New Deal principles he espoused.

Another factor conducive to party factionalism at the convention, and one which all representative bodies and party leaders must cope with, grew out of personal animosities and conflicting personalities. Such differences, of course, are inevitable whenever men deliberate in groups; they appear to be bitterest when members of the same political party are involved. As indicated above, Fish and Fearon were frequently at swords points (and for more than philosophic reasons). In fact, Mr. Fish was not always popular with a large number within his party. In one instance Fish secured the adoption of an amendment to the veteran's preference proposal excluding Communists from the civil service. Later he sought a simple and innocuous amendment to his amendment which would have changed an "or" to an "and." Chiefly as a result of being deserted by his own party, the entire Fish amendment was reconsidered and rejected.³¹ Although it is difficult to place one's finger on many definite examples

²⁹ *Record*, p. 935. See also *ibid.*, p. 740.

³⁰ *Ibid.*, p. 1366.

³¹ *Ibid.*, p. 3267.

where personalities rather than party or sociological differences affected the handling of issues before the convention, a close study of the record of debates leaves one certain that such situations arose from time to time. On one occasion when Mr. Murray Gootrad, Republican delegate from Brooklyn, arose to move to discharge the committee on industrial relations from further consideration of his measure guaranteeing to workers the right to organize and bargain collectively, President Crane felt compelled to ask for order, declaring:

Now, it seems that whenever Mr. Gootrad gets up we have so much noise that we cannot hear him and I will be bound that he will be heard. Let us have order.²²

Party factionalism, the result of personalities and of economic and sectional disputes, is a phenomenon not unique with constitutional conventions; it is a characteristic of all representative assemblies. However, there were other factors operating in the convention which aggravated this condition and caused party leaders many a headache. In the opinion of seasoned observers, party discipline at the convention fell far below the level of effectiveness normally prevalent during the sessions of the state legislature. Commenting on the political aspects of the debate on searches and seizures, Warren Moscow pointed out that the situation was complicated by the fact that neither side could be sure of a full attendance of its members. "The party discipline that exists in the Legislature and which can be counted to bring absentees hurrying to participate in an important roll-call has not yet been manifest in the convention."²³ Delegate Joseph

²² *Ibid.*, p. 1548. It is difficult to escape the impression that delegates Philip Halpern of Buffalo and Harold Riegelman of New York were at times also the victims of attack by members of their own party for reasons other than differences of political opinion.

²³ *The New York Times*, June 27, 1938. See also *ibid.*, August 12, 1938, when party leadership was cast overboard as a Republican delegate

McGinnies, for many years Republican Speaker of the State Assembly, complained bitterly of the lack of leadership which characterized the work of the convention. He called the attention of the delegates to the fact that

every important measure that has come before this Convention has been written on the floor of this Committee of the Whole, by amendments offered by individuals. Now, personally I can't see how very much thought has been given to these things. For instance, yesterday and the day before we offered a little over thirty amendments to the judiciary proposal. The housing bill was written on the floor. The home rule proposal and this one. (social welfare) ⁵⁴

The legislature, he emphasized, never works in such loose, headless fashion. Most legislative bills are fully ironed out in committee, and once they appear on the floor, party discipline usually is powerful enough to prevent major changes. But in the convention, measures submitted by committees rarely survived open debate on the floor without numerous and vital revisions. When the convention neared its close, there were so many snap amendments offered from the floor that the delegates frequently did not take the time nor the trouble to offer them in proper form. Instead, many of these amendments were sent up to the chair written on the backs of telegraph blanks, which liberally covered the desks of each member. Several proposals were even adopted in this form by the chair and by the chamber as a whole. What were the factors which produced this condition?

The answer to this question lies largely in the unusual composition of the convention's membership. Compared to the state legislature, the convention contained a much greater percentage of delegates who did not feel con-

asked for adjournment in the face of the opposition of his leader, and when Jacob A. Livingston, Democratic delegate, refused to yield the floor to Senator Wagner, his leader.

⁵⁴ *Record*, p. 2252.

strained to obey the party leadership on all occasions. The political independence of these delegates flowed from a number of considerations which attended their nomination and election. In the first place, many county leaders viewed the convention and membership in it as a most convenient means of rewarding either themselves, relatives, or party workers for loyal service in the past. Thus, sixty-four of the delegates (or one-third of the entire membership) were serving, or had served, on county committees, thirty as chairmen or vice-chairmen. The county chairman in New York State is the most important cog in the party machinery. His position is a powerful one and naturally breeds independence of thought and action. This is especially true upstate in the rural Republican counties. County leaders in this region, long accustomed to defeat in state-wide elections, have learned to rely on county rather than on state victories for the continuation of their control. With them it is instinctive to think first in terms of their county organizations. On matters of public policy affecting party strategy, they may even sacrifice the state-wide interests of the party to insure victory in their home counties. It is the law of political self-preservation and has frequently plagued the state leadership of the Republican party. The Democratic delegation suffered less from this than did their opponents. There were fewer county leaders from the metropolitan area attending the convention (the prestige attached to the office of delegate was much higher in the rural counties), and those who did participate were more accustomed to obeying state party leaders. The geographic propinquity of counties in New York City—as well as the much smaller number of them—diminishes the likelihood of diversity of interests on questions of public policy and makes simpler the achievement of unified leadership. But, in the case of upstate delegates, one cannot overlook the fact that many of them were past or present county lead-

ers, or their satellites, interested primarily in doing nothing to injure the standing of the party in their home counties.

In the second place, the personnel of the convention contained a large number of judicial delegates.³⁵ These men were designated by their party leaders chiefly in deference to the popular belief that judges more than anyone else understand the content and significance of "fundamental law." One will readily appreciate the fact that years of service on the bench do little to develop the qualities which make one a good follower of orders. Moreover, long tenure of office, which accompanies the position of jurist in New York State,³⁶ fortifies the natural judicial temperament of independence. This proclivity of the jurist was much in evidence during the course of the convention. Indeed, from time to time, sentiments were expressed by some delegates to the effect that the convention's history would have been happier had the judges stayed home.³⁷ Though the latter may be an extreme position to take, the fact remains that the presence of this large group of delegates with judicial backgrounds contributed materially to the general feeling of political independence which pervaded the delegations of both parties.

Thirdly, in this connection, it is pertinent to include another fairly sizeable group, composed of delegates, many of whom, for one reason or another, were not tightly bound by the decisions of party leaders: fifteen

³⁵ There were twenty-six jurists in all—eleven Supreme Court justices, four from the Appellate Division of the Supreme Court, two judges of the Court of Appeals, and nine others from minor courts.

³⁶ Justices of the Supreme Court and judges of the Court of Appeals are elected for terms of fourteen years.

³⁷ The most vigorous statement on this score came from Anthony J. Canney, Democrat, of Buffalo, during the discussion on searches and seizures. "Mr. Chairman, up until tonight I had the highest respect for the Supreme Court,—for the Court of Appeals and for all courts, but from today on they are ten cents a ton at heavy weight." (*Record*, p. 619.)

"elder statesmen," nine of whom were veterans of the 1915 convention; several bank presidents, sufficiently influential in their home counties to be designated by the county chairmen; several counsels for railroad and insurance companies; four executives of large real estate and insurance companies; and four newspaper publishers. Most of those listed here, as well as the county leaders and judges mentioned above, enjoyed a political independence rarely experienced by members of the usual legislative body.

Fourthly, a large proportion of the delegates held no elective state office and were thus relatively untroubled by the requirements of party regularity. In the legislature party discipline can be induced by the threat of leaders to consign a recalcitrant party member to political oblivion, or by the promise of reward in the form of patronage, important committee appointments and favorable treatment of personal and local bills. Members there are under a continuing responsibility generally to act in conformance with the wishes of those they have selected as leaders. But in a body whose life would terminate in a very few weeks, it was practically impossible to inculcate such a sense of continuing responsibility. Moreover, an overwhelming majority of the delegates were not faced with the hazards and worries of an approaching state election. Most of them held no elective office, and of those who did, jurists protected by long tenure made up the largest group. In fact, in the whole convention there were only eight assemblymen, eight state senators, three congressmen, one United States senator and two elected state administrators actively in state or national office. This fact, along with the natural political independence of those delegates who were county leaders, jurists, business and professional men, did little to discourage the intra-party disputes which broke out sporadically under pressure of

vital social issues.³⁸ The problems of personnel which confronted convention leaders of both parties are met by legislative leaders too, but nowhere in like degree. For example, jurists are not privileged to sit in legislative bodies, and there are few important business and professional men willing to spend time at the state capital. But, what is even more determinative, the desire for patronage, special consideration of local bills, and committee benefits, as well as the party's support in the next election, exercise great weight in keeping legislative members in line. Most of these weapons of legislative leadership are much less effective in the single-session constitutional convention. The conclusion may be hazarded, therefore, that future constitutional conventions in New York State, as well as elsewhere, will be confronted with a condition of generally ineffective party leadership, a product of the very nature of the convention process.

The calculations of party leaders attempting to achieve solidarity to promote party interests were at times also upset by the unpredictability of colleagues fired with personal political ambitions. According to a reliable reporter there were a dozen or more delegates, Democratic and Republican alike, "vitaly interested in using the convention for the incubation of their own political booms."³⁹ There were at least eight potential candidates for governor alone.⁴⁰ Although some of these delegates submerged

³⁸ One may recall, as a contributing factor, the pre-convention promises of party leaders pledging a "hands off" policy. For a time, in fact, Republican leaders appeared to follow such a course. Their failure to assert themselves strongly from the start undoubtedly added to their later troubles. Furthermore, the almost unprecedented manipulations of powerful interest groups combined with other forces to commit the delegates to courses of independent action.

³⁹ W. A. Warn, *The New York Times*, July 3, 1938.

⁴⁰ Abbot Low Moffat, Chairman of the Assembly Committee on Ways and Means—United States Senator Robert F. Wagner—ex-Senator George R. Fearon—Lithgow Osborne, Conservation Commissioner—John J. Bennett, Jr., Attorney General—Morris S. Tremaine, Comptroller—William

their ambitions in the interest of state or party welfare, there were others who seized every opportunity to improve their availability. Such instances of political opportunism rendered more acute the headaches of leadership and, at the same time, gave evidence that the representatives of the "people" found it difficult to shake off old political habits even when meeting in solemn constitutional convention. In the fight over the searches and seizures proposal, for example, Mr. Fearon, although he may have acted in all sincerity, took a stand which was interpreted by some as a bid for popular support in the coming gubernatorial campaign. Barely defeated for the Republican nomination in 1936, Fearon still had a strong following in his own party and was conceded an outside chance to capture the nomination in the approaching state party convention. His strongest opponent was New York's district attorney, Thomas E. Dewey. To be successful, Fearon had to arouse sufficient enthusiasm among the Republican rank and file to force a larger number of county leaders into his camp. It was believed that he made his move when he opposed the stand of Republican convention leaders and Thomas E. Dewey on the issue of searches and seizures. Opening his speech with the remark that he did not propose "to let mere political expediency sway my judgment on a matter of grave political principle," Fearon delivered a lengthy and emotional oration before the convention, opposing point by point the arguments raised by Dewey and others on the question and pleading with his colleagues to support the cause of individual rights.⁴¹ Lest he be identified too strongly with the Democrats, however, part of his fire was directed at the New Deal for its violation of the very principles espoused in the Democratic measure. Nevertheless he was

F Bleakley, Republican nominee for governor in 1936—and Frederick E. Crane, Chief Judge of the Court of Appeals.

⁴¹ *Record*, pp. 498-509

unable to sway many of the Republican delegates, and when the vote was taken only seven Republican voices were raised in support of Dunnigan's bill.⁴²

It is to be hoped that the impression is not created that Senator Fearon alone was guilty of speaking for electoral purposes. The above episode was selected out of many which the convention produced as particularly *a propos* in substantiating the claim that party and personal politics were intimately related to the work of the convention. Other examples of political speechmaking by candidates for high office fill many pages of the *Record*. The writers reveal no dark secrets in pointing this out. According to *The New York Times*, "The convention activity of William F. Bleakley, Republican candidate for Governor in 1936, has convinced Democrats and Republicans alike that he still has Gubernatorial ambitions."⁴³ On the Democratic side, Senator Wagner rarely held back when an opportunity for political gain offered itself. This may be verified by turning to his speeches on (1) the proposal to eliminate grade crossings,⁴⁴ (2) the health insurance provision of the social welfare article,⁴⁵ (3) the housing and slum clearance bill,⁴⁶ and (4) the question of racial discrimination.⁴⁷ Another Democratic delegate, Attor-

⁴² *The New York Times*, June 29, 1938. Fearon spoke often and long on most issues raised at the convention. Many of his speeches contained a strong political flavor. At one point Jacob Livingston, Democratic delegate, after listening to an address by Fearon charging the Democrats with making political speeches, declared, "I will admit frankly that a number of the speeches made in this Convention were for political reasons, and I will admit just as frankly that Senator Fearon contributed his full share to that quota." (*Record*, p. 2232.)

⁴³ May 3, 1938.

⁴⁴ *Record*, pp. 948-949.

⁴⁵ *Ibid.*, pp. 2219-2220.

⁴⁶ *Ibid.*, pp. 3088-3089.

⁴⁷ *Ibid.*, pp. 1120 ff. In each of these addresses Wagner took pains to review his own record on social issues of the day and to repeat his heartfelt sympathy for the underprivileged and his determination to continue in the path of social justice. Upon the conclusion of his remarks

ney General John J. Bennett, Jr., at one point was described as "the principal active candidate for Governor."⁴⁸ His sponsorship of, and vigorous fight for, the bill making membership in a public pension system a contractual relationship (Introductory 675), at times took on the appearance of an appeal for the political support of those in the state and municipal services who were interested in the protective features of the pension proposal.

The nature of politics is such that future constitutional conventions also will be unable to escape political electioneering during their deliberations. Outstanding candidates for major public offices cannot afford to refuse designation as delegates. The prestige of the office of delegate, together with the opportunity to go on record as ardent protagonists of popular measures, will guarantee their presence when conventions meet. Once immersed in the debates of the convention, few candidates for higher office will resist making political capital out of propitious situations. To the political maneuvers of party organizations as a whole, therefore, we must add as an organic function of the New York Constitutional Convention the political activities of individual aspirants for public office. In some instances personal ambitions and moves received the open or tacit support of the whole party; in other cases such ambitions produced a political individualism contributing to the general annoyance and difficulty of the party leadership. But in either case the methods used and the results achieved were of a political quality very familiar to students of the American legislative process.⁴⁹

on racial discrimination, Hamilton Fish, not to be outdone, delivered a speech on the same subject surpassing even Wagner's for eloquence and ballot appeal (*Ibid.* pp. 1195-1198)

⁴⁸ W. A. Warr, *The New York Times*, May 3, 1938

⁴⁹ Charges were frequently made on the floor that some delegates were making political speeches. On one occasion Senator Wagner took delegate Benjamin Feinburg (Republican) to task for criticizing Governor Lehman's message to the convention opposing Feinberg's bill for the ear-

So patent were evidences of party and personal politics that certain members of the convention finally rebelled. As adjournment approached, a bill was introduced and passed whose effect was to change the date for the next convention from 1958 to 1959. The latter year was deemed more desirable because, politically, it was an off year with no state-wide elections on the calendar. In taking this action, it was reported, "the convention supported the opinion of many delegates that too much emphasis at the present meeting had been placed on politics and not enough on a thoughtful consideration of the fundamental law of the State."⁵⁰ Judicial delegates especially were active in securing the adoption of this bill which was sponsored by the committee on future amendments, of which Judge Riley H. Heath was chairman. Expressing his accord with the proposal, Francis Martin (Democrat), Presiding Justice of the Appellate Division of the Supreme Court, first department, declared:

I think most of the delegates here are anxious to have this Convention held in an odd year, so that the delegates may give their time to rewriting the Constitution and not be compelled to listen to speeches for political purposes, and I think we would be able to write a much better Constitution.⁵¹

A similar sentiment was expressed by William J. Wal-

marking of gasoline taxes for highway purposes (Introductory 611) Wagner's criticism of Feinburg concluded with an eulogy of the Governor (who at that time was considered a potential candidate for the United States Senate). When Wagner had finished, Fearon remarked, "I do not rise to second the nomination of the Governor for the office of United States Senator. . . . I think we ought to keep the Record straight. This isn't a political convention, we are not nominating anybody for United States Senator tonight" (*Record*, p. 1084). Following another exchange, this time between Fearon and Livingston, delegate Frederic H. Bontecou (Republican) complained to the chairman of the convention. "I do not know why we should have to listen to so many political speeches. Two wrongs do not make a right" (*Ibid.*, p. 2232).

⁵⁰ *The New York Times*, August 11, 1938.

⁵¹ *Record*, p. 2587.

lin, Republican, who explained that "we will be relieved of the embarrassment of those who want to make speeches for the election."⁵²

While this proposal was under consideration, Supreme Court Justice Harry E. Lewis, Republican delegate from Brooklyn, offered an amendment to the effect that "no delegate shall be eligible to election to any public office within one year after the said Convention adjourns."⁵³ After a brief debate which revealed further evidences of an antijudicial sentiment on the part of some of the delegates, this amendment was rejected.⁵⁴

There is good reason to doubt that a shift in date to an odd year will have noticeable efficacy in eliminating politics from the next constitutional convention. Patronage, the desire to increase organizational strength, and the knowledge that the next election is only one year removed will be constantly in the foreground. In addition, party leadership, already at a disadvantage in the convention set-up, may be further weakened by the removal of an important incentive encouraging regularity on the part of some of the delegates—that is, party support in the approaching election. One consequence, then, of the change of date may be to promote personal politics at the expense

⁵² *Ibid.*, p. 2586

⁵³ *Ibid.*, pp. 2587-2588

⁵⁴ *Ibid.*, pp. 2588-2590 Some interesting verbal thrusts were made during this discussion. The exchange between Justice Lewis and Senator Wagner is worth repeating.

Wagner: "I think that most of the delegates feel that their long speeches are all right, but nobody else's are, anybody else's long speech is a political speech."

Lewis: "I am not directing any shaft at you."

Wagner: "As a matter of fact, I want to say in behalf of the delegates here, in spite of what has been suggested by one or two, there have been very few evasions of the rule that no politics should enter here, except in one or two instances, and those I do not care to mention as I do not want to embarrass the delegates."

Lewis: "You did not see me engage in any politics."

Wagner: "Well, there were two notable exceptions."

of party politics, thereby diminishing party responsibility for the fruits of the convention's efforts. Another effect may be to perpetuate the democratic fiction that constitutional conventions are non-political. However, regardless of the future consequences of this constitutional change, its very introduction and the debates which accompanied its adoption substantiate the contention that old-fashioned politics does not disappear in a constitutional convention.

The politics which ruled the convention from start to finish was particularly evident when that body performed its last official act. The final issue facing the delegates before adjournment was the question of submitting the results of their efforts to the voters. Should the people vote on each item separately or should they be lumped together to be accepted or rejected as a whole? The Constitutional Convention of 1915, adopting the latter policy, saw its work rejected by the public at the polls. Various groups and interests, bitterly opposed to specific items, in combination raised a barrier which supporters of the work as a whole were unable to surmount. The lesson of 1915, therefore, provided a powerful argument for those 1938 delegates who favored piecemeal voting. As early as April 6 it was reported that this was the position of President Crane. After conferring with members of the convention who had also served in 1915, he announced his objection to any scheme submitting to the voters "a single take-it or leave-it document."⁵⁵ But when the question became a live issue the latter part of August, President Crane washed his hands of the matter. Exhausted by his duties as presiding officer, he told a Republican conference that his work was finished and that the manner of submission was up to the political leaders of the party.⁵⁶

Needless to say, these leaders had already begun the task of devising a plan of presentation which promised

⁵⁵ Edwin McIntosh, *New York Herald Tribune*, April 7, 1938.

⁵⁶ Warren Moscow, *The New York Times*, August 20, 1938.

most for the party. On August 2 the convention appointed a special committee on the "time and manner of submitting proposed amendments to the electors," consisting of nine delegates—five Republican and four Democrats.⁵⁷ This committee, called by some the "Supreme Court of the Convention," at first planned a report consolidating all non-controversial proposals into one omnibus amendment, but providing for itemization of the controversial ones. Despite the participation of five leading Republicans on the committee, however, a "ground-swell movement" for the submission of the changes in one document rapidly developed within the Republican party. Fostered by upstate delegates, the argument was presented that more was to be gained by amalgamation regardless of whether the verdict at the polls would be acceptance or rejection of the convention's work. If accepted, the party would profit from provisions, such as reapportionment, which, if voted on separately, were almost certain to be defeated. On the other hand, if the voters rejected the new constitution, the state would be relieved of the obnoxious "liberal" amendments entailing huge monetary outlays by the state. Of the two results, the latter was, perhaps, the one preferred.

In conformance with this view, a conference of Republican delegates on the afternoon of August 19 agreed, it was reported, to support the lumping of all proposals into one amendment. The vote was "about 60 to 10."⁵⁸ This decision was most unpalatable to Republicans from New York City, who were desperately in need of campaign material with which to combat the New Deal in the metropolitan area. The fact that the Republican-controlled convention had adopted some liberal amendments was of

⁵⁷ Frederick E. Crane, Perley A. Pitcher, Joseph A. McGinnies, Abbot Low Moffat, Foster R. Piper, Robert F. Wagner, Alfred E. Smith, John J. Bennett, Jr., and Charles Poletti.

⁵⁸ Warren Moscow, *The New York Times*, August 20, 1938.

great political value to their cause. The course contemplated by their upstate colleagues might easily mean political disaster. Politics aside, many of the Republicans from the city were among the most able, conscientious and liberal delegates elected to the convention. Their record at the convention compels the opinion that they were sincerely desirous of separating the good from the bad. There were measures, such as the ban on "P. R." that they were anxious to defeat. But there were also provisions dealing with housing, transit unification, grade-crossing elimination and social welfare whose adoption they vigorously advocated. To combine all would be to defeat all or to adopt all. Either result was undesirable.

The convention completed the work on its calendar on August 19 and recessed for six days before meeting to consider the question of submission. The belief that a strong effort would be made to present only one amendment to the electors was apparently widely held, and opponents of this plan used the period of recess to register their emphatic disapproval. In a public letter to the delegates on August 23, Mayor LaGuardia announced that "responsible members of the convention" were asserting that serious consideration was being given to single submission by those desirous of forcing "the adoption of provisions certain to be defeated if separately submitted." He warned that "indignant and disappointed citizens" would rise in a body to reject all of the convention's work unless permitted to express their sentiments on each of the controversial amendments.⁹⁹ Before the delegates convened for their last session, they were confronted with many evidences of widespread agreement with LaGuardia's position. Civic and economic groups throughout the state made public their attitudes and were supported by the editorial opinion of the state's largest

⁹⁹ *The New York Times*, August 24, 1938.

newspapers. Governor Lehman, in a public letter to President Crane, denounced the projected move to deny the citizens of New York State the right to sift the work of the convention in accordance with their preferences.⁶⁰ It became increasingly apparent that here was an issue capable of arousing the "general public" sufficiently to assure rough going for the interest groups and politicians who approached the problem along avenues of expediency alone.⁶¹

Following its brief recess the convention met on August 25 to pass on the question of submission. Even at this late date no one on either side of the aisle could forecast the final decision. In a morning conference of Republicans "half a dozen different suggestions were presented, and there was no agreement on any."⁶² The upstate-downstate split seemed to be irreparable. Democratic ranks, on the other hand, were in better order, although Wagner was concerned with the possibility of another coalition between upstate Republicans and some Tammany Democrats. On the whole, Democratic leaders were in favor of presenting the new constitution in the form of about eight constitutional amendments. This would enable the Democrats to campaign for those proposals of a liberal character appealing strongly to urban voters, but would not close the door to attacks on such

⁶⁰ *Ibid.*, August 25, 1938.

⁶¹ The political undercurrents generated by this question contained also a rumor, reported to have substantial foundation, that a move would be made to combine the "P. R." and reapportionment amendments. The purpose of this strategy was to force organization Democrats of New York City to vote for a Republican reapportionment in order to get rid of "P. R." According to Warren Moscow, "This move is in the air and remains a possibility if the 'groundswell' movement for submission of the Constitution in one piece is defeated" (*Ibid.*, August 20, 1938.) The same opinion was expressed in *The New York Times* on the following day. However, this idea, if entertained, never was brought out into the open.

⁶² *Ibid.*, August 27, 1938.

measures as the reapportionment amendment, the tenth judicial district, and judicial review of administrative actions.

The final outcome depended upon the success of Democratic leaders in holding their members in line. A solid Democratic vote supported by the New York City Republican bloc would more than suffice to resolve the issue in favor of itemization. But minority leader Wagner was not certain of the obedience of many organization Democrats determined at all costs to secure the elimination of proportional representation. Standing alone, this amendment was in great danger of defeat; combined with other and more popular proposals, it had a chance to survive.

On the evening of August 25 the situation looked dark for the proponents of multiple submission. Over the protest of Senator Wagner a coalition of Democrats and Republicans forced an adjournment before the matter could be brought to a vote. The upstate bloc held firm in the balloting, and it appeared as if the break were coming from the other side. It was rumored that an "understanding" between a group of Tammany Democrats and rural Republicans was in the offing.⁶³

The final meeting of the convention took place on August 26 and was opened by the report of the committee on submission. The committee advised tendering eight separate amendments to the voters: reapportionment, social welfare, housing, railroad crossings elimination, judiciary, proportional representation, rapid transit, and an omnibus amendment including the remaining fifty-one "non-controversial" constitutional changes. It is significant that this report was opposed by two members of the committee, Foster Piper and Joseph McGinnies—both upstate Republicans. The Democrats and city Republicans on the committee were solidly behind it.⁶⁴

⁶³ *Ibid.*

⁶⁴ *Record*, p. 3530. Perley Pitcher, the only other up-state delegate on

Preferring eight amendments but eager to salvage anything from the wreck which threatened, the Democratic-urban Republican alliance agreed to compromise on five. Commissioner Robert Moses, acting as their spokesman, offered an amendment to the committee report which would have reduced the proposals to five by including grade-crossing elimination and transit unification in the omnibus amendment, and by combining the housing and social welfare provisions.⁶⁵ Shortly thereafter delegate Robert Whalen moved to amend the report further so as to reduce the number to three amendments.⁶⁶ The Whalen amendment marks the turning point in the debate, not because it survived, but because it inspired speeches which many believe swung the convention toward the principle of multiple submission.

William Kuczwalski, New York City Democrat, opposing both the Moses and Whalen amendments, vigorously protested against the undercurrent of politics which pervaded the issue at hand.

I want to leave one fact with the gentlemen and ladies of this Convention, that you are not going to sell any kind of a Constitution this November to the people of this State unless you give them a fair opportunity to vote upon the controversial matters separately. We have tried to satisfy this group and that group and this organization and some other party by voting and discussing proposals which were close to their hearts. But I want to say, Mr President, that this is our time, today, to give the people their chance. Let us do something for the people who sent us here. . . .

I have heard so much in this Convention that certain proposals were offered against the New Deal, others were offered against

the committee, was ill and unable to sign the report. However, he sent word that he approved of it (*ibid.*)

⁶⁵ *Ibid.*, p. 3537

⁶⁶ *Ibid.*, pp. 3540-3541. Whalen would have lumped all measures together with the exception of reapportionment and proportional representation. The latter two would be voted on individually.

the old deal. I am not concerned at all with whether this proposal is against the New Deal or that proposal is against the old deal. I just want to say . . . that I want to see the people of the State of New York get a straight deal. . . .⁶⁷

Kuczwalski was followed by Governor Smith who, speaking against the Whalen amendment, delivered the blast which finally routed the opposition to the committee report. He sternly warned the members of both parties of the political danger attached to denying the people the right to express a choice on controversial items.

Now, that is not smart politics, it is not good politics. There has been a great deal of jockeying for position here the last couple of months, and you are not putting yourselves in a very good position when you do something like that. Bear in mind that the only asset of a political party worth having is public confidence . . . and how do you expect the people of this State to have any confidence in a party which is going to make it difficult for them to get needed amendments to their fundamental law?

Turning more specifically to the Republican delegates he attributed their lack of political success in state elections to loss of public confidence. "Try and regain that public confidence. You all know how you lost it. It was too much politics. . . ." Then addressing the Democrats, he issued a solemn warning:

You are going into the campaign this fall with about as heavy a load as you can carry. Do not forget that The sins of the parents are visited on the children—the sins of some of the elder and younger statesmen at the National Capitol, with the brain trusters, the college professors, and about as great an aggregation of crack-pots as was ever brought together in any one part of the world. (Applause.)

Now, you have got that. Do not, in the name of good politics, do not add the last straw. It won't be the camel's back that will break, it will be the old donkey's⁶⁸

⁶⁷ *Ibid.*, p. 3542.

⁶⁸ *Ibid.*, pp. 3544-3545.

Daring to hope for no more than a compromise of five proposals, Smith's speech was made in support of the Moses amendment and against Whalen's. When the vote was taken on Whalen's amendment, the strength of the coalition working for the compression of the new constitutional changes into one or very few amendments exhibited surprising weakness. It was defeated by a vote of 108 to 43.⁶⁹ From that point on the opposition crumbled. Aided by a forceful speech delivered by Max Steuer, the committee report was accepted with only one modification. And this was a change which increased the proposals to nine by setting out the labor provision as a separate amendment.⁷⁰

The final vote on the committee report was 105 to 57. Only three Democrats, Robert F. Whalen, Joseph V. McKee, and Francis Martin, voted with upstate Republicans in opposition. On the other hand the liberal Republican forces mustered thirty-six votes in support of the report. It was the opinion of several witnesses of this scene that Governor Smith's appeal to the political good sense of both parties counted heavily in the convention's final decision. To his influence must also be added the effect upon the delegates of the many verbal and editorial expressions of opposition against single submission heard on all sides during the period of recess. Replaying an old role, Smith reduced to phrases acutely meaningful to the convention's politicians, the unorganized protests of the usually inarticulate "general public."

It is interesting to compare the note on which the 1938 Convention ended with that sounded by Elihu Root upon the conclusion of the New York State Constitutional Con-

⁶⁹ *Ibid.*, p. 3553

⁷⁰ *Ibid.*, p. 3554. It was proposed by Senator Dunnigan and adopted by a vote of 87 to 75. Republicans charged that Dunnigan offered it for purely political reasons. Since the labor issue was non-controversial, it was argued, it should have been left in the omnibus amendment.

vention of 1915. In his closing address to the delegates, Root, who had served as president throughout the convention, solemnly asserted that

this convention has risen above the plane of partisan politics. It has refused to make itself or permit itself to be made the agency of party advantage except as faithful service for the state is a benefit to party. It has refused to engage in the play of politics. . . . Our conception of our duty was to leave behind strife of party, and upon the higher plane of patriotism and love of country, to join all together, whatever our parties, doing the best we could for the prosperity of our beloved state.⁷¹

One hesitates to challenge the observation of a statesman of Root's stature. Yet, one finds it difficult to understand how a convention whose convening was preceded by extremely energetic and calculating party maneuvering could have divorced itself completely from the "politics" of the day. The writers, however, will not take issue with Root's attractive summary of the spirit which moved the 1915 Convention. But they do contend that if the picture he paints is authentic, it bears little resemblance to its 1938 successor. Delegates and disinterested observers alike are quite ready to admit that party politics, factional politics, and pressure politics were forces participating in every important decision of the New York Constitutional Convention of 1938. They are the stuff of democratic politics. They are the stuff of which the convention was made. They will continue to be the principal elements of future constitutional conventions as long as our government remains representative and our people remain free.

⁷¹ Root, Elihu, *Addresses on Government and Citizenship* (Cambridge, Harvard University Press, 1916), p. 209

CHAPTER VI

PRESSURE POLITICS AT THE CONVENTION

Political parties and pressure groups, singly or in varying combinations and coalitions, determine the course and achievements of representative assemblies. Together, these organizations make up the "living public" and directly or indirectly participate in molding the form and content of every significant piece of legislation. Whether the energies devoted to influencing public policy in a given instance emanate principally from party or from pressure group sources will depend largely upon the nature of the subject under consideration. Political parties will be the principal antagonists or protagonists when the issues are those affecting patronage or organizational strength. Such issues, which may be placed under the general heading of "job politics," were exemplified at the convention by such proposals as reapportionment, the tenth judicial district and permanent registration. The origin of these measures can be traced directly to party sources. But when the issues involved have economic and social significance, their conception can usually be traced to one or more of society's many pressure groups. These issues, which may be included within the general class called "policy politics," at the convention took the form of such measures as housing, health insurance and taxation.

Political parties, it has been declared, are chiefly interested in *who* shall hold office and exercise power, while the major concern of pressure groups is in *how* power is to be exercised and *what* policies are to be forthcoming. Hence, issues of "job politics" are associated with political parties, and issues of "policy politics" are associated with pressure groups. Unfortunately, the task of analyz-

ing legislative output by dividing it into these two broad classes is not so simple as the foregoing would indicate. In the first place, many issues take on the characteristics of both job and policy politics and defy classification. In the second place, both political parties and pressure groups are generally interested in both classes of legislation. For example, certain pressure groups may be vitally concerned with *who* exercises political power because of his known sympathy for or against particular public policies. On the other hand, political parties must be constantly alive to issues other than patronage matters because they rise or fall within a governmental unit chiefly on the basis of their "policy" records. Policy politics often take on the nature of party or job politics, therefore, because of the party's desire to improve its public prestige. A party may become the active champion of an issue sponsored by a pressure group whenever there appears some likelihood that that issue has become popular with a substantial number of the people. It is the function of political leaders to evaluate such policy questions in terms of their advantage to the party. Defeat at the polls, of course, is the penalty of a multiplication of bad guesses.

Although the distinction between the politics of getting a job and the politics of policy is a useful one, it cannot be pressed too far. It is perhaps true that political parties will be the prime movers in cases of job politics. But both political party and pressure group forces will be almost hopelessly commingled in the battle for or against specific issues falling within the classification of "policy politics." However, the point which may be made here is that the *source* of the influence originating and actively sponsoring patronage or organizational measures usually is found in the political party, while the *source* of the influence generating issues of economic and social importance generally is found in the pressure group.

In the preceding chapters we have described those ac-

tivities at the constitutional convention which are demonstrative of "job politics." In addition, we have considered some of the convention issues of general public policy in so far as they demonstrated conflict between and within parties. In this chapter it is our intention to continue our examination of the convention's treatment of questions of public policy, but this time from the standpoint of pressure group activities. This we may label "pressure politics" as distinguished from "party politics."

Attempts have been made by some students of democratic politics to divide pressure groups into two classes: (1) "interest groups" and (2) "idea groups." The former consists of those organizations who are actuated by desires of immediate self-gain. Organizations of farmers, laborers, and manufacturers afford us examples of this type of group. Idea groups on the other hand sponsor public policies whose aim it is to promote the "general good." The National Municipal League, the League of Women Voters, and the Citizens Union of New York are representative of this class. This rule of thumb is simple in appearance but difficult to apply in practice. Many pressure groups may engage today in political enterprises activated by hopes of self-aggrandizement but tomorrow may labor unselfishly and with equal fervor for objectives they believe will further the general welfare. The New York State teachers' lobby, for example, fought tooth and nail at the convention to reduce the scope of the city home rule amendment because of a fear that teachers' salaries and pensions might be adversely affected. On this occasion it was an interest group, solely and completely. But the same lobby has also struggled in the past for the passage of legislation calculated to improve the state's educational system, acting thus as an idea group.

The distinction between interest and idea groups runs into further difficulty because of the common tendency to identify group interest with the general welfare. What

benefits business, it is argued, benefits everyone. What is good for the farmer is good for the state and the nation. Adopt those measures advocated by farmer and businessman, and the interests of all will be served. This is not written in criticism but to point out the difficulty of separating pressure groups into the categories given above. What are selfish motives? What are unselfish motives? Who is to say whether the public weal will be advanced more by groups professing to think only in terms of the general welfare than by groups operating more obviously on planes of self-interest? Indeed, one may ask, what is meant by the terms "public welfare" and "general interest?" Are they concepts representing universally accepted objectives and means transcending those sought by individuals and by organized groups? Or are they concepts irrevocably fixed to, or composed of the interests and desires of the individuals and groups which make up the body politic? Perhaps a good case can be made for the latter view, a view which accepts not only the inevitability but also the desirability of pressure groups and their activities in democratic society. Pressure groups constitute a second line of defense in the process of setting up intermediate organizations to maintain contact with and control over government. Just as political parties established themselves to implement the decision-making of formal government institutions, so have pressure groups established themselves to implement the decision-making of political parties in their control of formal government institutions. Pressure groups may be said to represent a combination of "public" and "private." As intermediaries between some sections of the people and the people's government, they might be called "businesses affected with a public interest." It is the function of democratic government to reconcile the apparently conflicting interests of these groups and through the deliberative process to achieve a rough approximation of that

interest called "general" or "public" which cannot be dissociated from but is a composite of its individual parts.¹ To approach the general interest in any other way is to substitute the decree of one or a few as to its composition for the result produced by the interplay of the active elements which together make up a self-governing public. This is essentially the substitution offered by Fascism.

Of course, one cannot condone the more nefarious methods utilized by certain interest groups. Nor should objections be raised to an enlightened regulation of the political activities of all pressure groups. But interest groups as such should not be condemned merely because they are known to be promoting their own interests. Nor should idea groups be supported on all occasions because they pretend to seek the public interest. It should be recognized that all pressure groups, bearing either the adjectives "interest" or "idea," have contributions to make in the political life of a democratic state. This important fact apparently was appreciated by Mr. Henry W. Koch, Republican delegate to the constitutional convention, when, during the debate on the Fairberg bill proposing the earmarking for highway purposes of gasoline taxes collected in New York State, he remarked:

It seems to me that I have received letters from every sort of organization that there is in New York State, and I think it is a constitutional right of organizations to let us delegates know what they are thinking about . . . and I am sure that I am willing to hear what the gasoline people have to say about this. . . .²

¹ President Franklin D. Roosevelt supports this thesis when he declares that the duty of society is to create "wholesome relationships among the various cultural, religious, racial and economic interest groups which make up the American people" "The sum of these complex and composite interests," he asserts, "constitutes what we mean by American democracy" (Letter to the Director of the Institute of Human Relations, August 20, 1937)

² *Record*, p. 1524.

Pressure groups must be accepted as an inevitable concomitant of a representative democracy. An honest and accurate conception of the workings of democracy cannot be achieved either by closing one's eyes to the vital position occupied by pressure groups or by adamantly refusing to accept suggestions or programs because they are known to emanate from these sources. To be sure, their offerings in the way of solutions for social and economic problems of the day must be received with a healthy skepticism by layman, government practitioner, and student alike. There must be an awareness of the source of each contribution and, if possible, of the motives behind it. Once these facts are known, the participants in the deliberative process will be in a position to frame policies which are (as nearly as is ever possible in a representative system) conducive to the general good. The value of pressure group contributions was openly recognized by the New York Constitutional Convention of 1938 whose committees held formal, public hearings on every important proposal coming before them. As will be shown below, practically every pressure group in the state took advantage of the opportunities afforded by these committee hearings to submit briefs on a multitude of questions.

There is an abundance of written material describing and evaluating the techniques and powers of pressure groups affecting the operations of legislative bodies. There is, conversely, a surprising lack of written matter regarding the role of these organizations in constitutional conventions. It will be our aim in the remainder of this chapter to describe some of the activities of pressure groups during the New York Constitutional Convention of 1938. We have suggested that the extent and value of their role is not to be measured by easy moral judgment. It is to be hoped that the following pages will not be construed as a criticism of pressure groups as such; rather, it is our purpose to show that constitutional conventions

offer attractions at least as irresistible to these interests as those presented by the proceedings of an average legislative body. What were the objectives of pressure groups at the convention? How did they gain access to the processes of constitution-making? How were they received and what did they accomplish?

Pressure groups are too strongly established as forces in the democratic process to be expected to go into hiding when constitutional conventions begin their work. As early as April 25 President Crane announced from the chair that he had received on that day as many as twenty-six "petitions, remonstrances, communications . . . resolutions" from "public bodies, individuals and organizations" regarding constitutional revisions.³ The forecast was made at that time that the convention would "be more open to suggestions from the public than any other similar body in the past."⁴ This prophecy was fully realized. It is safe to say that even had the convention not been voluntarily "open to suggestions" such an opening would have been forced by the sheer weight and number of the groups represented at Albany during the summer of 1938. "Private" pressure groups of both the interest and the idea variety crowded committee hearings, hotel lobbies and the convention chamber itself. Nor were "public" pressure groups absent. Representatives of political subdivisions and administrative agencies carefully followed the deliberations, fought for proposals of their own and roundly denounced those they disliked.

Of the private pressure groups, the following were among the most active: The Citizens Union of New York City, National Municipal League, League of Women Voters, General Federation of Women's Clubs, Society for the Prevention of Crime, Association of Public Wel-

³ *Ibid.*, pp. 67-68.

⁴ Warren Moscow, *The New York Times*, April 26, 1938.

fare Officials, East Side Tenants Union, Henry Street Settlement, American Association of Social Workers, American Association of Social Security, New York State Association of Civil Service, Knights of Columbus, National Catholic Alumni Federation, New York State Catholic Welfare Commission, Christian Science Commission on Publications for State of New York, New York State Council of Churches, New York Eastern Annual Conference of Methodist Episcopal Church, National Conference on Legalizing Lotteries, Civic League of New York, United Neighborhood Houses, National Federation of Settlements, Consumers' League of New York, Welfare Conference of New York City, Forest Preserve Association, State Charities Aid Association, New York State School Board Association, Joint Committee of Teachers Organizations, New York State Police Conference, Citizens' Budget Commission of New York City, Milk Consumers' Protective Commission, Metropolitan Cooperative Milk Producers, New York State Taxpayers' League, United Taxpayers' League of Buffalo, New York City Merchants' Association, New York Chamber of Commerce, New York State Junior Chamber of Commerce, New York State Automobile Association, Empire State Gasoline Dealers' Association, Associated Trucking Industry, Maritime Association of New York, New York State Construction Council, New York State Grange, American Association of Advertizing Agencies, National Outdoor Advertising Bureau, Advertising Club of Syracuse, Real Estate Board of New York, Forty Second Street Association, Realty Advisory Board, Savings Bank Association of New York, New York State Bankers Association, New York Academy of Medicine, New York State Hospital Association, Citizens' Medical Preference Bureau, New York Medical Association, The Association of the Bar of the City of New York, New York State Bar Association, National Lawyers' Guild, New York State

Federation of Labor, Congress for Industrial Organization, Workers Alliance, American Legion, Veterans of Foreign Wars, German-American Bund, National Bureau of Insurance Companies, Association of Casualty and Surety Executives, Pomona Grange and Insurance Association of New York, Long Island Railroad, Associated Railroads of New York State, Consumers' Public Power Conference, Niagara Falls Power Company, Consolidated Edison Company, Rockland Power and Light Company, Associated Gas and Electric Company, and the Niagara-Hudson Power Company.

This list, and it is not complete, reveals that all types of pressure groups publicly recorded their attitudes on proposed revisions of the state's constitutional law. Interest and idea groups, large and small groups, weak and powerful groups, humanitarian, social, religious and economic interests, all contributed something to the complicated process of policy formation. What did these groups seek?

One or more of five objectives was foremost in the minds of each of the hundreds of lobbyists descending on Albany when the convention opened: (1) There was first the natural hope of securing favors not previously granted either by the constitution, legislation or administrative practice. Examples of this type of endeavor are afforded by the pension and the veteran's preference bills introduced during the opening days of the convention. The first of these was adopted; it provided that membership in any pension or retirement system of the state or of a civil division thereof, after July 1, 1940, shall constitute a contractual relationship, the benefits of which shall not be diminished or impaired. Almost every pension group in the state threw its weight behind this measure. Organizations of policemen and firemen particularly insisted on its passage. Inasmuch as the pension funds of the latter groups in most cities have not been set up on actuarially

sound bases but depend principally on annual appropriations to meet retirement costs, one can readily appreciate the deep regard felt by policemen and firemen for the pension amendment. Representatives of war veterans, on the other hand, were thwarted in their attempt to secure preference for *all* veterans in state civil service examinations and appointments. (Existing legislation extends preference only to disabled veterans.) The margin of defeat, however, was very slender and came only after a prolonged and vigorous debate.⁵

(2) Another, and equally obvious, function of lobbyists was to kill, or to draw the teeth of, proposals threatening injury to the interests they represented. Several cases in point may be cited: Insurance companies and bar associations combined to defeat the bill providing for compulsory automobile insurance, to be administered by a state board. The power interests and their friends successfully resisted an attempt to give the state a firmer grip on its natural power resources. And the real estate boards were able to modify the housing amendment so as to relieve real estate of some of the charges which might be incurred by a housing program.

(3) A third pressure group objective consisted of imposing limits on legislative power not hitherto exercised but potentially capable of adversely affecting private interests. An example of this is the Schenck amendment which forbids the legislature to deprive municipally-owned utilities of the right to earn a fair return. This succeeds in blocking any future legislative program using local, publicly-owned power plants to reduce the rates charged by private concerns.

⁵ The desire for special consideration at times took the form of requests for the erection of administrative departments constructed to handle problems of immediate concern to certain groups. For example, the real estate interests urged the creation of a state department of real estate and mortgage, while Associated Industries of New York State, speaking

(4) The consolidation of privileges already bestowed by legislative action constituted still another aim of special interests at the convention. Here the purpose was to guard against a future change of heart on the part of the state legislature. For example, organized labor secured the adoption of what was termed "labor's bill of rights." Among other things it guaranteed that no laborer on state projects shall receive less than the prevailing wage nor be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency. Freedom to organize and the right to bargain collectively were also confirmed. Similar guarantees for several years had been part of the state's labor law, drafted and adopted by regular legislative process.

(5) The final objective was to place in the constitution safeguards anticipating possible judicial decisions which would nullify rights such groups now possessed or which might be conferred upon them in the future by a favorable legislature. The social welfare amendment, for instance, opens with the words "nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy . . . or for the protection by insurance or otherwise; against the hazards of unemployment, sickness and old age. . . ." Increased resort by courts to the principle of judicial review in recent decades has produced similar precautionary provisions on many subjects in most state constitutions throughout the country. Related to this objective was the successful effort of certain Catholic organizations to overcome by constitutional change a judicial decision which had nullified a statute providing a service of advantage to Catholics. In 1936 the legislature passed an act providing for the transportation of parochial school children to and from rural

for manufacturers, made some effort to secure a state department of industry.

schools. In *Judd v. Board of Education of Hempstead* (278 N. Y. 200) this act was declared invalid by the Court of Appeals. A constitutional amendment empowering the legislature to provide this service was adopted by the convention.⁶

The aforementioned pressure aims differ from those driving special interests before legislative bodies only to the extent that the legal jurisdiction of the latter is more restricted than is that of a constitutional convention. Securing new favors or preserving old ones remained the mainsprings of action. But the pressure turned on the delegates during the summer of 1938 was more intense than that usually felt by state senators and assemblymen. This can be attributed, in part at least, to the less transitory character of a convention's output. Twenty years separate constitutional conventions in New York State. Special favors conferred in 1938 promised to be secure until 1958—unless revoked by piecemeal amendment—regardless of changes in the mood of the legislature. Conversely, any restriction on privileges or power would be effective for a similar period. The stakes were higher than those played for when the legislature meets. More could be won; more could be lost. Is it to be wondered that the lobbyists played the game with a zeal rarely equalled in non-convention years?

One finds in every representative chamber members representing many walks of life. Farmers, lawyers, businessmen, journalists and others usually continue to follow their chosen professions even though spending part of

⁶ Those strongly urging its adoption were the New York Council of the Knights of Columbus, the National Catholic Alumni Federation and the New York State Welfare Committee. It was opposed by the New York State Council of Churches, the New York State School Boards Association and the National Committee of the League opposed to Secretarian Appropriations (See the packages of correspondence deposited in the New York State Library by the judiciary committee of the constitutional convention)

each year in work of a political nature. This is perhaps more true of state legislatures than it is of Congress. Shorter legislative seasons and considerably lower pay discourage in most states complete reliance on politics for a livelihood. (It is recognized, of course, that some state legislators do make politics a full time job.) There is a very natural and understandable tendency on the part of representatives of various professions to look at problems and issues in the light of their own experience and in terms of the effect of such issues on the economic activity which concerns them most. To be sure, loyalty to the party may submerge some of the attitudes cultivated by professional backgrounds. This is especially true of a representative's reaction to patronage and partisan issues. Doubtless, there are occasions when party loyalty will even control his actions on bills which appear to work a hardship on the interests of which he is a part. But it would be expecting too much of human nature to deny that the sectional, social, economic and religious background of members of a representative assembly influence their votes on many questions falling within the field of "policy politics." To the extent that a legislator's vote is dictated by those factors, he is acting as the representative of a pressure group *within* a legislative hall. Consequently, studies of pressure politics must take into account the relation between issues and the personnel of deliberative bodies.

The constitutional convention of 1938 was a lawyers' convention. Exactly two-thirds of the delegates were members of the legal profession, twenty-six being judges. This fact may explain, in part at least, the action taken on such measures as compulsory automobile insurance and the enlargement of the power of the courts to review administrative rulings. The first of these proposals would have created a state compulsory automobile accident insurance system similar in detail to the average workmen's

compensation plan. Unquestionably, the adoption of this plan would have reduced the large number of negligence cases passing through private law offices in the state. Unanimous opposition to this proposal was registered in a resolution adopted by the state bar association.⁷ It was charged that it was another step in changing the form of our government from a democracy to a bureaucracy. Whether this reason for opposition was more effective than the fear of a reduction in law business is at least open to doubt. Delegate Francis Bergan, speaking before the Albany County Bar Association, scored the "inarticulate" attitude of lawyers on measures that affect their livelihood and reported that the "lawyer bloc" in the convention had united to kill the negligence amendment.⁸ It was never reported out of committee.

Other groups were also represented among the delegates. For example, some thirty of the delegates were war veterans, including two past commanders of the American Legion in New York State.⁹ The very first measure submitted to the convention dealt with veterans preference in the civil service of the state. Veterans preference was finally defeated, but only after an extended debate which saw several delegate veterans, including both past commanders, argue strongly in its favor.¹⁰

⁷ *The New York Times*, July 2, 1938

⁸ *The Knickerbocker News*, June 17, 1938. However, the lawyers were not alone in their opposition to this amendment. At a public hearing on June 1 it was denounced by the New York State Grange and by the sixty-one companies making up the Association of Casualty and Security Executives. A representative of the latter group contended that the proposal "threatened the very basis of present-day insurance" (*The New York Times*, June 2, 1938.)

⁹ *Record*, p. 608.

¹⁰ *Ibid.*, pp. 2373-2387; 3248-3275. A proposal to exempt veterans and their widows from real estate taxes on assessments up to \$2500.00 (Introductory 363) was defeated in committee. During the debate on veterans preference, delegate Seth Cole, who is the counsel for the volunteer firemen association of New York State, repeatedly attempted to amend the measure so as to include volunteer firemen within its scope.

Beneficiaries of state and local pension funds made up another group substantially represented on the floor of the convention. This group was closely concerned with the measure making membership in a pension system a contractual relationship. Delegate Livingston Platt of Rye risked embarrassing these members by remarking:

As I look around this chamber, I am sure there are a great many of our delegates who are members of pension funds, and I question very sincerely whether this Convention, or whether any man in this Convention, who is going to receive a benefit from this fund, should vote on this amendment.¹¹

Business had its quota of representatives: there were several bank presidents and representatives of railroad, real estate, insurance and manufacturing concerns. Delegate Claude O. Stuart, a businessman from Elmira, spoke forcibly against including health insurance in the social welfare amendment. Openly announcing that he represented the businessman's viewpoint in this matter, he declared:

If any steering committee prompts me to say this, it is the steering committee of business and industry and commerce . . . Business . . . happens to be my field. I know it is almost an impossible task these days to conduct legitimate business and at the same time carrying the increasing load of taxation which is being saddled onto it from every source—laudable and humanitarian as many of them may be . . . without that continued support of the basic thing we call business and industry, where are you going to have the income to build up all these bureaucratic agencies and commissions, good and fine as they may be? ¹²

He persisted on the ground that veterans and volunteer firemen are "the two great branches of the service of the State in which service is rendered on a voluntary basis." (*Ibid.*, 3246.)

¹¹ *Ibid.*, pp. 2620-2621. A similar view was expressed by Philip Halpern of Buffalo. "If this goes through, and there are many public employees in this Convention, what would the public say to the public employees who come to this Convention and propose such a measure?" (*Ibid.*, p. 1472.)

¹² *Ibid.*, pp. 2243-2244.

Speaking on the same subject, Daniel F. Imrie, introducer of the proposal to strike health insurance from the social welfare amendment, and a businessman from Glens Falls, pleaded with the convention to consider the needs of business:

Just before we quit, just once, can we not give the wage earner an opportunity to have employment, can we not give business an opportunity, can we not give the taxpayer of the State in all these respects a break, for the time we have taken here, the money of the taxpayers we have spent ourselves and obligated the taxpayers to spend? " (Applause)¹³

New York State banking interests found an able champion in delegate Martin Saxe of New York City. A few years before, Mr. Saxe had been a successful counsel for a group of banks that won from the city of New York a tax refund of more than ten million dollars. He was reported " to have received a fee of one million dollars for his services in that case." " Mr. Saxe was given the effective post of chairman of the convention's committee on taxation, a committee which reported out several proposals designed to protect the banks of New York State. One of these stipulated that state banks should not be taxed more heavily than national banks. Another would have prohibited the delegation to localities of state taxing power. The latter measure was aimed at New York City's proposed tax on bank deposits. So vigorous was the protest of Mr. Abbot Low Moffat, a member of the taxation committee, that these measures were held up long enough to force the calling of a public hearing to argue their merits. At a committee meeting on June 14 Mr. Moffat was reported to have objected that the proposal barring a bank-deposit tax would incur criticism if sent to the convention as a committee measure, particularly " in view of

¹³ *Ibid.*, p. 2214

¹⁴ *The New York Times*, June 15, 1938.

Mr. Saxe's bank connections." ¹⁵ In his remarks later to the convention Mr. Saxe quite frankly admitted that one of the purposes of his committee's recommendations was to place safeguards in the constitution shielding the banks of the state from objectionable legislation.¹⁶

Nor were the power interests entirely unrepresented. In the debate on the power amendment Clarence R. Runals of Lewiston, rising to speak against an increase in public control over the power industry in New York State, admitted his connection with the Niagara Falls Power Company but went on to protest any connection between that fact and his attitude on the bill in question.

One of the clients of my firm for the past thirty years has been the Niagara Falls Power Company . . . I make that statement in all frankness to you because I believe it my duty as a delegate to this Convention to correct certain inaccuracies which have been made

No one in the ordinary walk of life can divorce from his mind the knowledge that he has acquired prior to the time that he came here as a delegate. I speak to you not as an attorney for the power company, but as a delegate to this Convention, because I sincerely believe that the interests of the people of the Niagara frontier are the same as the interests of the Niagara Falls Power Company ¹⁷

Without in any way questioning the views and motives

¹⁵ *Ibid* Later, when the tax article was being considered by the convention as a whole, Mr. Moffat declared "There is absolutely no justification for writing in a special provision to protect the banks of this State any more than there is justification for writing in a special clause in our Constitution to protect utility companies, railroad companies or any other type of corporation . . . We know what has brought this on. Every member here knows that what brought this to a head was the proposed New York taxes on banks and banking deposits . . . You should not single out one particular class of corporation for special preferential treatment . . . I think this proposal is socially unsound." (*Record*, pp. 1184-1185.)

¹⁶ *Record*, pp. 1187-1188; 2520-2521.

¹⁷ *Ibid.*, p. 2860.

of Mr. Runals, it is not unreasonable to say that private power had, if not an active champion, at least a friend in court. And that is the only point which the immediately foregoing material is intended to establish. Disregarding motives, the position may be taken that in constitutional conventions as well as in the proceedings of state and national legislatures, many of the innumerable interests making up organized society find themselves with representatives qualified to speak from the very floor of those chambers. Pressure group forces at the convention, therefore, began their work first within that assembly's membership.¹⁵ When we recall the relative impotence of political leadership at the convention, one begins to appreciate the strategic position of the lobbyists. Little restrained by the dictates of political expediency, many of the above delegates were able to give free rein to their opinions as group representatives.

Although direct representation among the delegates smoothed the way for several economic groups within the state, access to the process of constitution-making depended for the most part on the conventional pressure group technique of operating from the outside. Both direct and indirect methods were used to achieve desired ends. Except for pointing out that many groups (utilities, lawyers, insurance companies, doctors, teachers, automobile clubs, etc.) utilized the indirect method of building up favorable public attitudes—relying in part on "public" pressure to secure desired delegate responses—the

¹⁵ Delegate Robert E. Whalen of Albany, introducer of the amendment which would have greatly facilitated judicial review of administrative rulings (including those of the Public Service Commission), has for years acted as counsel for the New York Central Railroad. Delegate John Dunnigan of New York City and one of the Democratic floor leaders was the acknowledged spokesman at the convention of the New York State Federation of Labor, while Charles Poletti, also a delegate from New York City, performed the same function for the American Labor Party—a party composed of members drawn from economic backgrounds sufficiently identical to be considered for our purposes a pressure group.

writers will confine themselves to describing briefly some of the more direct tactics used. These tactics varied little from those practiced when the legislature meets.

Some organizations called conferences to draft detailed constitutional programs before or immediately after the convention opened, gave them wide publicity, and then labored to secure their adoption in whole or in part.¹⁹ A striking example of this procedure was afforded by the activities of the Federation of Labor whose executive council met in Albany in April and drew up an eleven-point program, including a five-day, forty-hour week for all persons in state employ. Delegate John Dunnigan, one of the minority leaders of the convention and brother-in-law of George Meany, then president of the Federation, was designated as its official spokesman and on April 26 formally offered the eleven-point platform to the convention in the name of the New York State Federation of Labor.²⁰ A considerable part of this program eventually became the "labor's-bill-of-rights" amendment which was approved by the convention with only four dissenting votes.

Many measures adopted by the convention were formu-

¹⁹ See the "complete draft of a proposed new state constitution" prepared by the Brooklyn Chamber of Commerce (*The New York Times*, March 6, 1938), the program of the American Labor Party for "reframing" the state constitution (*ibid.*, April 18, 1938), the proposals of the National Municipal League adopted at a conference in Schenectady on April 22 in conjunction with representatives of local bureaus of municipal research, chambers of commerce, New York City Citizens Union, Citizens Housing Council of New York City, taxpayer research bureaus, Real Estate Bureau Association, League of Women Voters, Civil Service Reform Association and the Real Estate Owners Association (*ibid.*, April 24, 1938); the New York City Bar Association program for revising the judiciary article (*ibid.*, April 18, 1938), the proposals of the Merchants Association of New York City (*ibid.* April 28, May 2, 23, and June 7, 1938), the suggestions of the New York State Bar Association (*ibid.*, July 2 and 31, 1938); and the recommendations of the automobile clubs of New York State (*ibid.*, April 10, 1938).

²⁰ *Ibid.*, April 27, 1938

lated by public or private interest groups and passed in substantially the same form as when originally submitted. In some cases convention delegates and committees eagerly sought the aid of such groups and publicly gave them full credit for their assistance. The amendment unifying rapid transit lines in New York City under governmental ownership and control was drawn up by the LaGuardia administration, the Transit Commission and the private street railway companies of New York City.²¹ According to Warren Moscow, the local finance amendment, containing features aimed at restricting the tax burden on real estate, was drawn by representatives of the New York City Citizens' Budget Commission and the New York State Savings Bank Association.²² Upon the opening of the debate on the taxation article, Mr. Saxe announced that his committee on taxation had gotten more help from the New York City Merchants' Association than from any other source. Chairman Edward F. Corsi of the social welfare committee announced his indebtedness to the state departments of social welfare, health and labor for the formulation of his social welfare amendment. According to Delegate Benn Kenyon who introduced the veterans preference amendment, his proposal "had its inception in the annual meeting of the American Legion which was held a year ago in Troy, at which time a resolution was passed asking that preference similar to that already granted to disabled veterans should be extended to all veterans in the State." Once drafted the bill came "under the surveillance and discussions of other units of veterans in the State of New York" and was approved by appropriate resolutions by the "Veterans of Foreign Wars, Spanish Veterans, Catholic Veterans, Jewish Veterans, and all of the military veterans' organizations, soldiers or sailors or marines or nurses who par-

²¹ *Record*, pp. 1827-1829

²² *The New York Times*, May 17, 1938

ticipated in any of the wars in which this country has been engaged." ²⁸

The examples just given indicate that both public and private interest groups participated in the very first stage of the process of translating wishes and ideas into constitutional law—bill drafting. They demonstrate, further, that those who represented the sovereign people were quite willing to accept the opinions and assistance of those who were chosen to speak for the several interests. Bill drafting is a pressure group device against which few will protest. Publicly acknowledged, it is one of the healthier forms of "pressure" and remains so as long as all interested parties have similar opportunities. In general, the delegates at the convention looked with considerable sophistication upon the tactics and maneuvers of the interests with whom they were required to deal. Although, as we shall see later, a few harassed delegates lodged protests against particular groups or objectionable practices, as a body the convention was willing to accept the important role of these interests and in a few instances publicly commended some for their valuable help.

Most of the well-recognized pressure group devices were brought into play during the life of the convention. We have already mentioned a few of these—securing representation within the convention's personnel, preparing and publicizing complete constitutional programs, and drafting specific amendments. Literally hundreds of organizations bombarded the convention's committees with letters, petitions and resolutions. Health insurance, judicial review of administrative rulings, auto insurance and the limitation of outdoor advertising inspired both organized and unorganized correspondence on a large scale. In fact, the latter issue never reached the floor of the convention; the combined literary opposition of organized labor and advertising companies sufficed to snuff it out in

²⁸ *Ibid.*, pp. 2373-2374.

committee. Formal public hearings were called by many convention committees to obtain individual and group reactions to proposed amendments. With few exceptions these public forums were well attended, several being held, because of the many interests desiring to be heard, in the Assembly chamber which was the meeting hall of the convention itself. It is interesting to compare the easy access of the general public to the function of constitution-making in 1938 with the guarded secrecy of the deliberations of the founders in 1787. In this comparison lies much of the explanation of the nature of modern state constitutions.²⁴

There were many reported instances of informal conferences between lobbyists and convention committees and delegates. Following a persistent rumor that the committee on industrial relations was planning to kill all labor proposals before it, *The New York Times* reported that "George Meany, President of the New York State Federation of Labor, has been particularly active during the past week and has spent a great deal of time here in conference with committee members."²⁵

Another device used by organized groups was to designate a delegate to act as group spokesman for all or specific measures. Reference has been made to the fact that John Dunnigan and Charles Poletti were official spokesmen for the Federation of Labor and the American Labor Party respectively. In the midst of the discussion on social welfare, Delegate Jerome D. Barnum declared that "At the earnest request of the farm organization I spoke against the proposal on including health insurance. . . ." ²⁶ This remark was intended to fortify the argu-

²⁴ It is interesting to note that in answer to the questionnaire sent by the writers to the delegates, one of the members suggested as a means of improving future conventions that the meetings be secret and that the press be barred.

²⁵ July 12, 1938.

²⁶ *Record*, p. 3243.

ments of those opposed to this measure and indicates that the delegates were not at all averse to parading the names of powerful organizations as additional means of strengthening their briefs on particular measures. For a short period the debate on the issue of veterans preference was given over quite completely to the listing by several delegates of the various organizations that had registered their approval or disapproval of the proposal.²⁷

From time to time individual delegates and the convention as a whole were swamped by floods of correspondence. Health insurance, housing, judicial review of administrative decisions, veterans preference and the proposal to restrict collections from gasoline taxes to highway purposes produced barrages of mail which at times brought protests from the delegates.²⁸ On July 30, following one of the stormy battles over health insurance, *The New York Times* featured its report with the words "Health Insurance Fought at Albany by Mail Barrage." "Convention delegates," it continued "have been flooded during the past few days with letters and telegrams against . . . the proposal. A majority of the protests are attributed to insurance companies." This issue of the *Times* also carried a copy of a letter sent by a Syracuse insurance association to "all agents" urging its members to protest against the passage of the health insurance measure.

The efficacy of quantities of letters and telegrams in affecting the course of legislation is difficult to determine. However, there were occasions when a few letters from well-placed organizations contributed heavily toward achieving pressure group objectives. The best example of this is to be found in those pages of the *Record* devoted

²⁷ *Ibid.*, pp. 3251-3255.

²⁸ See the remarks of Charles Poletti concerning the heavy correspondence from the gasoline associations and the New York State Construction Council in favor of the gasoline tax measure (*ibid.*, 1518).

to the final day of discussion on the grade-crossing amendment. This measure was introduced by the Honorable Robert Moses and proposed to relieve the railroads of the state from any costs incurred because of the elimination of grade crossings. Prior to this the railroads had been required to bear fifty percent of the charge, with the state and locality paying the remainder. It was the contention of Mr. Moses and many other delegates that the poor financial condition of the railroads, as well as the legal difficulty of securing compliance with existing state law, doomed the state to the perpetual danger of grade crossings. The state must assume the full cost if action was to be expected. No one questioned the honesty of those supporting the Moses amendment. It was to be expected, however, that the railroads of the state were united behind this measure.²⁰ Powerful opposition to the idea of relieving the railroads of all financial burden in this matter developed among many of the delegates and the issue dragged on for several weeks. A compromise measure was finally drawn up stipulating that the railroads were to pay for the benefit they received from the eliminations but not to exceed fifteen percent of the total cost. This compromise also faced tough sledding until Senator Fearon, its sponsor, disclosed that he had been dickering with the railroads and had secured their agreement to the fifteen percent figure. He then proceeded to read to the delegates letters from Associated Railroads of New York and from the Long Island Railroad in which they pledged themselves immediately to commence work upon the eliminations "in the event that the following constitutional amendment is adopted. . . ." The letters, almost identical in composition, then outlined a proposed amendment

²⁰ The Associated Railroads of New York State filed a memorandum with the convention committee on highways, parkways and grade crossings urging the adoption of the Moses bill (*ibid.*, p. 716)

based on the fifteen percent compromise.¹⁰ Upon this assurance the opposition to the grade-crossing amendment was largely dissolved. To be sure, the general interest in removing a great hazard to human life was a powerful factor enabling the railroads to dictate the terms of their collaboration in this matter.

On occasion some groups coalesced so as to strengthen their driving power on particular measures. The coalition of insurance companies and the medical profession against health insurance, and of the insurance companies and the legal profession against compulsory automobile insurance are cases in point.

Delegates, singly and collectively, were sought out while travelling to and from the convention hall and were not immune from lobbyists even on trains, in restaurants and in hotel rooms. One of the few protests lodged at the convention against pressure group tactics had to do with this well-established but annoying practice which deprived the delegates of much of their privacy. During his remarks against the proposal of Alfred E. Smith which would have exempted real estate from future housing and slum-clearance costs, Delegate Edward Weinfeld of New York City referred with some heat to "special pressure" groups crowding the convention's precincts.

I came up on the train and there were droves and hordes of them on the train, button-holing you as you went along, and you find them in the lobbies, in the hotels, all coming up here to get special grants, a special favor, a special exemption for a specific group.¹¹

Speaking on the same issue, Chairman Joseph C. Baldwin of the committee on housing protested against the unusual zeal of the real estate interests. Objecting to the proposed concession to real estate, Baldwin asserted that he wanted to make it clear to the delegates that

¹⁰ *Record*, pp 1090-1095.

¹¹ *Record*, p. 1631.

I do not yield either to threats or to insults, when a group, a pressure group, such as was mentioned here earlier this evening, comes to see me in my office and threatens me, unless I exempt real estate . . . and I do not intend to yield. Mr. Chairman, tonight, tomorrow, or any other time, to any pressure group. . . .²²

It was not at all unusual to find lobbyists exercising their powers of persuasion in the convention chamber itself. Judge Joseph M. Proskauer, counsel to the Niagara Hudson Corporation, and unalterably opposed to the Polletti power amendment, "presented his side of the case to the delegates in the lobby of the Assembly Chamber." Approached by newspaper men, he protested that he was not bringing counter-proposals to the convention; he was simply giving "legal advice" to some of the delegates.²³

During the torrid debate on the city home rule measure, a representative of the National Municipal League was ordered from the convention floor for interfering with the progress of business. The repartee occasioned by this episode bears repetition.

Mr. Pitcher: Mr. President, I think Mr. Hallett should not do that. I think that is very wrong, Mr. Hallett, right in the midst of a vote here.

I know what you are doing, but the delegates should not be interfered with by lobbyists on this floor when we are debating a matter of this importance.

Mr. Riegelman: I think it is only fair to say—

Mr. Pitcher: I do not care to hear that. You must keep away. There has been too much of this going on around here.²⁴

In defense of Mr. Hallett it may be said that he was merely handing Mr. Riegelman material the latter had

²² *Ibid.*, p. 1541.

²³ *The New York Times*, August 11, 1938. A day or two before this event occurred, Judge Proskauer formally was granted "the privileges of the floor" by vote of the delegates.

asked him to prepare. However, Mr. Pitcher's comments indicate that other lobbyists had not refrained from mixing with the delegates on the floor. To the student of pressure politics it is to be regretted that the only lobbyist singled out for public reprimand was one representing one of the more enlightened "idea" groups.

Widespread as were the operations of pressure groups, it must be conceded that for the most part they maneuvered in the full light of day. Lobbyists were everywhere but conducted themselves so as to leave little doubt regarding their interests, their methods and their objectives. The scene was typical of democratic politics. However, one issue did raise the charge that "mysterious forces" acting *sub rosa* were thwarting the public will for selfish reasons, at the same time trying to give the impression of disinterest. The Poletti power amendment purposed to vest in the State of New York the right to develop as well as to own all of the power resources adjacent to the St. Lawrence and Niagara Rivers. It was introduced at the unanimous request of the trustees of the New York Power Authority; its policy had been approved by every governor since Charles Evans Hughes (with the exception of Nathan Miller); and it was supported by a majority of the responsible newspapers in the state.¹⁵ Because of the political character of the debate this question elicited, the claim that vested interests were working undercover to defeat any increase in the state's control over its power resources must be accepted with caution. Nevertheless, the charge was made frequently enough, and from a sufficient variety of sources, at least to warrant recording it here.

A search through the correspondence sent to the committees of the constitutional convention discloses no letter

¹⁵ *The New York Times, New York World-Telegram, New York Daily News, New York Post, New York Daily Mirror*, and the upstate newspaper chain owned by Frank Gannett. (Record, p. 2812)

or communication denouncing the Poletti amendment emanating from any power company or utility organization. Although representatives of the utility interests did attend the public utility committee's public hearing on the subject, not one voice was raised in objection to the purpose or methods of Poletti's proposal. Those present at the hearing were overwhelmingly in favor of it. Nonetheless, the committee on two separate occasions voted against reporting out the measure to the convention. This precipitated a widespread public reaction. The gist of editorial opinion was to the effect that the least the committee could do was to release this measure to the convention without recommendation. Mayor LaGuardia addressed a public letter to Chairman Martin W. Deyo of the public utilities committee protesting against the underground machinations of powerful interests and urging a curb on "power grabs."

I am informed that at the public hearing the official representatives of the Niagara Hudson Power Company present did not oppose the recommendation that the St. Lawrence and Niagara resources be retained for the people. They never do. I am informed also that on the municipal utility program proposal the official representatives of the large utility companies voiced no direct opposition. They never do. They are able to get legislation without public appearances

Can it be that some mysterious forces are operating in ways known only to themselves to kill these measures which are an essential requirement of the people of the State of New York?

The power trusts must not be allowed to block these needed reforms. I feel that it is a major task of the Constitutional Convention to see that they do not do so²⁰

Delegate Charles Poletti went even farther than the mayor, declaring openly that the members of the committee on public utilities acted in the interest of "en-

²⁰ *The New York Times*, July 27, 1938.

trenched utility monopolies," or under the influence of "mysterious forces."²⁷

Repeated warnings on the part of state Republican leaders that the committee's action would have a harmful effect on party fortunes in the approaching fall elections finally forced the committee's hands. Balloting for a third time it sent the Poletti measure to the convention floor where it was voted down in the closing days of the convention by a combination of upstate Republicans and Tammany Democrats. Following its defeat, Poletti, in a radio address, again charged that his amendment was killed by the "forces of reaction and special interests" and called on the people to "make known their indignation at this sacrifice of their rights."²⁸

With the possible exception of the tactics of vested interests on the power issue, however, few legitimate complaints can be lodged against the pressure group methods discussed in the preceding pages. Each is supported by a long history of political usage. Each is accepted by the political realist as a useful device for ascertaining the general will. The channels of functional representation were well-worn long before 1938; once the convention opened its doors, the pressure groups of New York State slipped very easily into accustomed grooves of procedure.

Observers of contemporary democratic politics are well aware that those who administer public policy cannot be divorced from the process of policy formation in the first instance. The most cursory examination of the output of the national or state legislatures for any given period reveals that a large percentage not only of minor but also of major pieces of legislation springs from the desires and

²⁷ W. A. Warn, *ibid.*, July 29, 1938

²⁸ *Ibid.*, August 18, 1938. The editors of the *Nation* declared that the convention's action on power exhibits "the patience, the pertinacity, and the craftiness with which the aluminum trust and the power trust pursue their intention to gain possession of two of our greatest sources of power" (July 30, 1938, p. 101.)

experiences of administrative officials. The close union between the function of administering and the function of legislating is perhaps an inevitable product of the politics of democracy in an age of highly developed but precariously balanced finance capitalism. Within limits, such a union makes possible an intelligent integration and planning of governmental activities. But there are many who fear its potentialities for subverting the public will. Doubtless, public administrators and civil servants may develop sentiments toward their work and jobs which take on many of the characteristics of a vested interest. In the absence of adequate controls these sentiments at times may inspire bureaucratic activities designed to broaden the power of an administrative department or to make more secure the positions and prestige of a group of civil servants. To be sure, it has been the vogue in recent years to attack the "bureaucrats" on the slightest pretext. The cry of "wolf" has been heard so frequently that it has lost much of its force. Nevertheless, it is to the interest of those who profess an abiding faith in democratic institutions to keep in mind that those who administer may also for certain purposes constitute "pressure groups" with vested interests.

The story of pressure group activities at the convention would be but partly told, therefore, were we to omit any reference to what may be called "public" pressure groups. These interests were also represented among the delegates to the constitutional convention. Six administrators of high standing were elected as delegates: John J. Bennett, Jr., Attorney General; Lithgow Osborne, Conservation Commissioner; Morris S. Tremaine, Comptroller; William J. Wallin, Vice Chancellor of the Board of Regents of the University of New York State; Maldwin Fertig, New York City Transit Commission; and Robert Moses, Chairman of the State Council of Parks and President of the Long Island State Park Commission.

These delegates were able, public-spirited administrators of proven worth. Each was concerned with advancing what he conceived to be the public good. Nevertheless, on one or two occasions considerations of departmental or administrative welfare inspired the arguments of some members of this group. Attorney General Bennett, for example, introduced and powerfully aided the passage of the measure which made membership in a pension or retirement system of the state or a municipal corporation a contractual relationship entitled to constitutional protection as such. Practically every civil servant of the state was behind Bennett's amendment.

Vice Chancellor William Wallin of the Board of Regents at one point in the debate on the measure which would have earmarked gasoline taxes for highway purposes took a stand which showed clearly the force of his conditioning in the field of education. He opposed the suggested allocation of gasoline taxes because of his fear that in time of financial depression education, with its heavy burdens, would be the first to suffer a cut in its budget. This, he believed, would be hastened by making inaccessible to the general budget revenue collected from the sale of gasoline. As he put it:

The State Education department or the educational system receives approximately one-third of the State budget, and it would find itself, I am sure, in a position where it was the easiest place to make a cut, so that instead of having a 10 per cent cut we might very readily have had anywhere from a 20 to a 30 per cent cut in our funds.

I am sure you will find very great opposition, reasonable opposition on the part of those interested in the educational system . . . to putting this in the Constitution of the State of New York.

¹⁰ *Record*, p. 1517. Mr. Wallin introduced four measures at the convention. Of these, two, Introductory 301 and 346, were intended to safeguard the financing and administration of the state's educational system.

Without denying that in this case the public interest and the interest of the state educational system coincided, this debate, as well as the debate on civil service pensions, demonstrates the pressure group possibilities of administrative officers. Moreover, it would appear that their efforts to defeat reductions in departmental powers and appropriations have more opportunities for success in constitutional conventions where they may appear as delegates than in legislative bodies from whose floors they are barred.⁴⁰

Public pressure group influence during the convention, however, relied not so much upon spokesmen among the delegates as upon the powerful numerical forces represented by large bodies of civil servants. We have already mentioned the success enjoyed by members of state and municipal pension funds. Associations of policemen and firemen were especially potent in securing this victory—a victory looked upon by some as little more than a raid on state and city treasuries.⁴¹ Social welfare workers and or-

⁴⁰ There were instances when administrative officials fought one another at the convention over questions concerning their particular jurisdictions. During a public hearing of the committee on the governor and other state officers, Public Service Commissioner Teal Brewster strenuously objected to a proposed constitutional amendment empowering the attorney general and his assistants to be sole counsel for every department, office, bureau or agency of the state. This amendment was supported by Attorney General John J. Bennett, Jr. (*The New York Times*, June 15, 1938). On another occasion the Public Service Commission issued a unanimous declaration of hostility to the Robert Moses bill on grade-crossing elimination which would have stripped the commission of its authority over this problem. (*Ibid.*, July 5, 1938.)

⁴¹ In the debate on the measure Delegate Harold Riegelman of New York City declared that "the State Police Conference have moved heaven and earth to get this proposal before the Convention" (*Record*, p. 2546.)

Further, he asserted, "I think there is no question in the minds of any persons who are familiar with the conditions of the pension systems in this State, and more particularly the condition of the non-actuarial pension systems, that the proposal sponsored by Attorney General Bennett is a very ill-disguised raid upon the credit of the State and its municipali-

ganizations united to secure the passage of a constitutional amendment defining public welfare as a responsibility of government and empowering the state to legislate to aid and support the needy faced with unemployment, sickness or old age. The same groups labored for the approval of the amendment providing for the use of public credit in slum clearance and housing projects.⁴² But it was the controversy over the extension of municipal home rule which produced the largest and firmest consolidation of forces on the part of permanent and non-permanent administrative officers.

Several municipal home rule amendments were introduced during the early days of the convention—one of them was drafted by Mayor LaGuardia, long an advocate of an enlargement of New York City's control over its own affairs. Although the various proposals differed as to detail, they all sought to limit the state's power to deal by special act (whether passed by regular or extraordinary legislative procedure) with matters primarily of a local character. Most of these measures would have deprived the state, except by general law, of the power to require cities to make mandatory expenditures in areas defined by the state. The proposal of Mr. Riegelman, chairman of the committee on cities, stressed this point by stating specifically that cities by local laws, not inconsistent with general laws or the constitution, could supersede, amend

ties. It transforms the non-actuarial pension systems, many of which provide grossly excessive benefits and some of which receive no contributions from the employees into legal, binding contractual obligations. The effect is to saddle the State and its municipalities with additional debt estimated at \$800,000,000. It encourages pressure groups to seek constant increases in benefits because every new benefit, no matter how imprudent, becomes contractual and cannot be recalled. The measure is class legislation of the most patent kind" (*Ibid.*, p. 2609)

⁴² Some of these groups were the Association of Public Welfare Officials, the American Association of Social Workers, the New York State Association of Civil Service, the American Association of Social Welfare, and the American Association for Social Security

or repeal state laws dealing with the selection, removal, terms of office, compensation, pension and retirement contributions and benefits of all city employees, as well as county employees paid out of city funds. Riegelman's proposal became the major bone of contention of the home rule controversy and aroused the fury of virtually every civil service organization in the state. The latter feared any disturbance of the *status quo* which had been wrung out of the state legislature only after years of joint collaboration and agitation on their part.

Mayor LaGuardia of New York City and the New York State Conference of Mayors were firmly behind the elimination of mandatory expenditures, and during public hearings of the committee on cities pleaded for an extension of municipal power. Mayor LaGuardia called attention to the fact that New York City has actual control over less than one-fifth of its annual tax levy budget of about six hundred millions because of debt-service requirements and mandatory state legislation prescribing the salaries to be paid certain classes of city employees, such as teachers, court officials and clerks and various county officials. But the Mayor and other advocates of home rule were helpless in the face of the mass demonstration launched by teachers, firemen, policemen and other civil service groups against the home rule amendment. School teachers were particularly vehement in denouncing the Riegelman proposal. They charged that it would subject the educational system to the vagaries of local politics. More than any other group, the state's organized teachers were responsible for extracting the most effective home rule provisions from Riegelman's bill. Reporting on the scenes developed during the public hearing on this question, *The New York Times* carried the following lead:

Home Rule Plans Fought at Hearing as School Attack. Albany Sitting Brings Mass Defense Against 'Tinkering' with Educa-

tion System. Teacher, Parent, Civil Service Speakers, Led by Marshall, Overwhelm Proposal's Backers ⁴³

One hundred and ten speakers representing chiefly firemen, policemen, teachers and other public employee organizations objected at this hearing to the Riegelman bill. The hearing chamber was crammed to capacity with one thousand members of the parent-teachers association who enthusiastically cheered speakers supporting their viewpoint " and loudly booed and hissed those who expressed opposite opinions. . . . More than once, a speaker favoring the Riegelman . . . bill was forced to cut short his remarks and take his seat in a thunder of booes from the delegation which according to its leaders, was defending academic freedom and independence from politics." ⁴⁴ In the end the civil servants of the state prevailed and the convention was forced to drop all schemes for major revisions of the home rule article. The final amendment adopted on this subject merely made some modification in the emergency clause and widened somewhat the scope of municipal jurisdiction. Specifically omitted from the powers of municipalities were the salaries of teachers and pension and retirement funds.⁴⁵ Once the convention was

⁴³ June 3, 1938 The Mr Marshall mentioned here is James Marshall, President of the New York City Board of Education

⁴⁴ *Ibid.* By no means the least interesting aspect of this conflict was the alignment of municipal political officials against municipal administrative officers. The State Conference of Mayors sent representatives to support Riegelman at the hearing. Mayor LaGuardia, Mr Newbold Morris, President of the New York City Council, and the mayors of Buffalo, Syracuse and Albany, as well as the city manager of Rochester, also favored the measures expanding city home rule powers. The big guns in the attack on the administrative side were James Marshall, President of the New York City Board of Education, Ernest L. Cole, Deputy Commissioner of the Department of Education, and Abraham Lefkowitz, Vice Chairman of the Joint Committee of Teachers Organizations

⁴⁵ See the Constitution of New York State, Article XII, Section 13B. As is true of most questions of broad public policy, final disposition of the home rule amendment was effected not only by the power of public

over, it was with some pride and with complete justification that the Joint Committee of Teachers Organizations sent to the public schools in New York City a bulletin announcing their unqualified success in defeating every proposal which threatened the interests of their members.

Departmental officers and permanent civil servants were not the only public pressure groups whose influence was felt at the convention. County and city governmental units closely watched the proceedings at Albany; their representatives appeared frequently at public hearings to safeguard local political interests. Mayor LaGuardia was very active during the summer, personally addressing convention committees on such questions as home rule, judicial organization, housing, grade crossing elimination, and social welfare. On several occasions LaGuardia sent public letters to the delegates: he opposed the Democratic bill to outlaw wiretapping, and roundly denounced the action of the committee on public utilities which twice refused to report out the Poletti power amendment. During his absences from Albany he was competently represented by Reuben Lazarus, the city's lobbyist and troubleshooter during legislative sessions. At times, the President of the New York City Council, Mr. Newbold Morris, and the Comptroller, Mr. Joseph McGoldrick, represented the city at public and private sessions of various convention committees. Transit unification, taxation and housing

pressure groups but also by considerations of party politics. There was no clear-cut cleavage between Democrats and Republicans on this question. However, a large bloc of upstate Republicans led by Senator Fearon voted to limit the scope of this amendment so that the state legislature, usually dominated by Republicans, would still retain a large measure of control over municipalities governed normally by the Democratic party—particularly New York City. These Republicans were joined by organization Democrats in New York City who, although traditionally for more home rule, hesitated to give greater power to the LaGuardia administration. Political support for a broad home rule amendment came principally from New York City Republicans and a group of independent Democrats.

were some of the questions with which these men concerned themselves. On a larger scale, the New York Conference of Mayors, representing virtually every municipality in the state, actively sponsored proposals dealing with local taxation, and municipal and village home rule. And, finally, the powerful voice of Governor Lehman was heard on several convention issues. The governor, who had refused to be a delegate, exercised more influence on constitutional questions than most of the delegates. Conferences with Democratic party leaders were supplemented by several messages which were read to the assembled delegates at times best calculated to affect the outcome of the deliberations. In all, Governor Lehman addressed seven messages to the convention: he supported the bills outlawing wiretapping and giving the state a firmer grasp on its power resources, and argued against those imposing the full cost of grade-crossing elimination on the state, allocating gasoline taxes to highway purposes only, broadening judicial review of administrative decisions and extending preference to all veterans. His final message (to President Crane), warned against any attempt to submit to the people in one lump all of the proposals adopted by the delegates.

Public administrators, civil servants and state and local political officers, therefore, must be ranged alongside of private pressure groups and political parties as influences impinging on the process of constitution-making. On several occasions theirs was the force responsible for initiating and passing new constitutional provisions and rejecting or modifying others. At other times they were called on by delegates and committees to draft proposals or to give advice on matters relating to their special fields of professional knowledge. Much of the output of the convention bears the imprint of their energy, interest and ability.⁴⁴

⁴⁴ The Hon. Mark Graves, Commissioner of Taxation and Finance, and

The democracy of American politics makes difficult the exclusion of any important interest from participation in the process of policy-making, whether at the legislative or the constitutional level. At no stage of the constitutional convention were public or private pressure groups divorced from the proceedings. Their objectives and their methods were cut from long-familiar political patterns, while access to the process of remodelling the constitution was facilitated by the convention's general readiness to accept pressure groups as part of the political scheme of things. The average delegate's viewpoint on the matter was expressed by Henry W. Koch when he declared that he had "received letters from every sort of organization there is in New York State," and added, "I think it is a constitutional right of organizations to let us delegates know what they are thinking about." It was to be expected, of course, that the tactics of some groups would prove sufficiently annoying to inspire public censure on the part of a few delegates. It was pointed out above that the housing question developed such high-pressure tactics that Edward Weinfeld and Joseph Baldwin of New York City felt constrained to rebuke the "hordes and droves" of lobbyists who "buttonholed" the delegates and even "threatened" them in their offices.⁴⁷ To be sure, delegates were not above crying "pressure group" or "vested interest" as a means of fortifying an argument against a given measure. Nor, conversely, when the occasion pre-

his two associates on the state tax commission were made honorary members of the convention's tax committee and appeared frequently before it to give advice. Commissioner David C. Adie, head of the state social welfare department, Dr. Edward S. Godfrey, Jr., chief of the state health department, and Elmer F. Andrews, state industrial commissioner, were frequent witnesses at public and private sessions of the social welfare committee. The New York State Power Authority sent a communication to the convention analyzing all of the issues relating to power then before the latter body, and was represented at the public hearings held on the Poletti power amendment.

⁴⁷ See above, p. 175.

sented itself, did delegates hesitate to parade before the assembled convention the names of groups supporting pet measures. But, on the whole, the presence and the agitation of group representatives were looked upon with easy complacency by the delegates, a sophistication of attitude not made more difficult by group representation among the convention's own personnel.

It is a much simpler task to discover evidences of pressure group maneuverings than it is to measure their effectiveness. Organized groups constitute only one of the many elements making up the political context from which public policy emerges. Personal political ambitions, party struggles, political factionalism, even the personal enmities or friendships legislators hold for one another, are also vital elements affecting the functions of deliberative agencies. In very few cases can one attribute precisely to one factor a given legislative move. For example, among the proposed amendments considered by the convention, housing, health insurance, gambling, city home rule, power, appeals of administrative rulings and the gasoline tax measures aroused concerted pressure group drives to secure their acceptance or rejection. But each of these issues was also heavily loaded with considerations of party politics, throwing Democrat against Republican or party faction against party faction. It would be presumptuous of us here to decide which factor, group pressure or party politics, provided the determining force in the disposition of these issues. We can only point out that much evidence is available indicating great pressure group interest with regard to them. It is pertinent also to note that with the exception of health insurance and the gasoline tax amendments, the "interests" won a complete or substantial victory in each instance.

In the case of certain other proposals handled by the convention, the decisive influence of several lobbies stands out more boldly. Compulsory automobile insurance, taxa-

tion, state and municipal employee pensions, municipal utility rates, labor's bill of rights, grade-crossing elimination, transportation for parochial school children and veterans preference were issues creating virtually no party differences. They were not made party questions, and one looks in vain in the *Record* for any evidence of party warfare in their consideration. With the exception of veterans preference, these matters were disposed of by the convention in accordance with the wishes of the major organizations which sponsored or opposed them. To be sure, the convention's action in these cases may in large part have been due to the independent judgment of many delegates whose conception of the general welfare may quite by accident have coincided with the position taken by powerful interests. But the general absence of party strife in the handling of these proposals, coupled with the fact that their treatment followed closely the direction insisted upon by those organizations principally affected by them, justifies the conclusion that pressure groups used their weight with telling effect as they participated in the task of constitution-making.

Experienced political observers and practitioners alike agree that for assiduity and aggressiveness lobbying at the convention touched a new high for New York State. Governor Alfred E. Smith, for all of his political realism, could not refrain from commenting on the strength of "the old pressure pump" and "the propaganda that has swept over us."⁴⁸ Edwin Weinfeld was "appalled at the number of very definite and specific restrictions or grants of exemption that have been granted to specific groups in this Convention. . . ."⁴⁹

⁴⁸ *Record*, p. 1512. Governor Smith went on to add that "one of the real troubles of this country today, and in all of the State capitols is the influence of what we call pressure groups, men who are looking for something from the State or from the nation and use their organizations for the purpose of promoting their ideas and their wishes with respect to it . . ." (*ibid.*).

⁴⁹ *Ibid.*, p. 1631.

An excellent conclusion for the contents of this chapter can be found in the statement of Warren Moscow, Albany correspondent of *The New York Times*, who has reported several legislative sessions as well as the convention. Writing in the *Times* shortly after the convention's close, Moscow described that body as being

more completely under the domination of lobbyists than any session of the New York State Legislature in recent years. While it is true that one lobbyist (for a civic organization) was chased from the floor, at least two other lobbyists were formally voted the privileges of the floor by the convention, and a score more waited around back of the rail to talk to delegates and to check up on who voted how on the various standing votes. The influence of the lobbyists was apparent in many votes taken on many issues ⁸⁰

⁸⁰ August 21, 1938.

CHAPTER VII

THE CONVENTION AS A LEGISLATIVE BODY

From time to time we have asserted in this study that it is difficult to distinguish the New York Constitutional Convention from a typical session of the state legislature.

Some differences do appear, of course, and these have been noted in earlier pages. The convention was a unicameral body. Its jurisdiction was broader. Its membership, in the main, was drawn from different sources. Compared to the legislature the convention suffered from a chronic lack of responsible and effective leadership, at the same time enduring rougher handling by the organized pressures that besieged it. But in form, substance and spirit the convention could easily have passed for its technically inferior sister, the legislature. The convention was organized by the majority party. Key party and legislative officials manned its committees and acted as floor leaders. Patronage was dispensed according to principles well established by legislative practice. The very rules of convention procedure were taken over bodily from the New York Senate. Weeks of inactivity during the first two months of the convention's life sharply contrast with the last three weeks when a flood of proposals was speedily disposed of amid scenes of confusion which practically every state legislature reenacts annually or biennially. And, finally, in both the convention and the legislature, party politics and pressure groups, mixed in varying quantities, constituted the primary forces guiding the deliberations and producing concrete results.

But, aside from forces and techniques, what of the results? Is it possible that the form and content of the subject matter introduced, discussed, adopted and rejected

at the convention were "constitutional" rather than "legislative?" Or does the convention's claim for uniqueness break down even here?

The difficulty of differentiating between law that is "constitutional" or "fundamental" and law which is "legislative" or "statutory" has already been pointed out. No adequate criteria have yet been evolved which will satisfactorily perform this task. Are matters inherently "constitutional" or inherently "legislative"; or are they "constitutional" because they are placed in constitutions through the functioning of the people's sovereign will? Perhaps laws become "fundamental" when for the convenience of flexibility they are drafted in broad terms and made a part of the written constitution. The same concepts, formulated in great detail, conversely, may by draftsmanship be reduced to the statutory level. Or, finally, a principle may be labelled "constitutional" (whether written or unwritten) only when it becomes ingrained in the public consciousness as a precept binding upon all governmental agencies, whether constitutional conventions or otherwise. One thing is certain: the gulf between written "constitutional" and "legislative" matter has been greatly narrowed in both the states and the nation since the period when America first gave birth to written constitutions. This has been the product of judicial review; of the broadening of the suffrage; of a widespread increase in the number of "constitutional" limitations on legislative action, closely following on the heels of general popular distrust of legislative bodies during the last half of the nineteenth century; of successful improvement of the techniques and power of interest groups, able to secure special benefits even in the form of constitutional amendments; and, more lately, of the desire of some of these groups to anticipate possible adverse judicial decisions invalidating legislative action taken in their interest. In view of this condition, the task of evaluating

the work of the convention in terms of the "constitutional" or "legislative" quality of its output is reduced simply to placing matters quite arbitrarily in one category or another. That this will inspire criticism and differences of opinion is to be expected.

In all, a total of six hundred and ninety-four proposals were introduced in the convention and submitted to appropriate committees for consideration. They ranged in content and purpose from measures permitting the legislature to conduct no more than three lotteries in one year, and enabling notaries and commissioners of deeds to be eligible for election to the state legislature, to measures as "fundamental" as that providing that "all persons within the jurisdiction of this state shall be entitled to full and equal protection of the laws, without regard to race, color, religion or creed." Most of the six hundred and ninety-four bills, of course, were buried in committee, and need not concern us here. But it may be worthwhile quickly to run over the list of those proposals actually adopted by the convention.

Nine amendments were submitted to the voters by the convention. Of these, the first was an omnibus amendment containing fifty separate proposals. In all, then, fifty-eight constitutional amendments were voted on in the 1938 elections. These may be roughly classified as follows:

A. "Constitutional" or "fundamental": This group consists of those amendments habitually regarded as properly constitutional because they concern the structure and power of the executive, legislative and judicial branches of government, the selection and duties of government officials, the rights of individuals and the division of authority between the state and local government units.¹ In this class we find provisions (1) increasing the

¹ One must bear in mind that constitutional provisions dealing with

measure of home rule for villages of over 5,000; (2) adding to the home rule powers of cities; (3) establishing safeguards when the right of trial by jury is waived; (4) prohibiting racial or religious discrimination; (5) modifying the qualifications required of members of the legislature; (6) affecting the offices and powers of the governor and the lieutenant-governor; (7) prohibiting the suspension of the writ of habeas corpus; (8) limiting the passage of special laws affecting counties; (9) changing the time for the assembling of the state legislature; (10) modifying the amending process; (11) improving judicial organization and procedure and facilitating judicial review of administrative actions; (12) requiring the official publication of administrative rules and regulations; (13) restricting searches and seizures; (14) prohibiting proportional representation as a system of voting throughout the state; and (15) guaranteeing labor the right to organize and bargain collectively.

B. "Legislative" or "Statutory". Most of the proposals listed in this group do not contain material intrinsically organic in content. But their purposes were to be achieved by formal amendment rather than statutory enactment chiefly because of legislative material already in the constitution. So lengthy and, therefore, inflexible has the state constitution become that the government finds difficulty in keeping abreast of the times. The only remedies are to scrap the entire constitution and build anew or to pass more "legislative" amendments modifying "legislative" constitutional provisions. The latter is the

these primary matters may be lengthened to include so much detailed material that they become little more than statutory codes. For example, a fair case might be made out for the view that the right of labor to organize is sufficiently fundamental to be appropriate for constitutional protection. But when to such a constitutional provision is added certain terms of future labor contracts on public projects, such as a five-day, forty-hour week, that provision takes on a legislative character

course of least resistance. This condition is not unique with New York State; practically all states suffer from constitutions which have degenerated into statutory codes.

The amendments which can be placed in this category include provisions (1) increasing the allowances for the travelling expenses of legislators; (2) limiting the power of the legislature to pass special laws concerning the building of bridges; (3) permitting the legislature to appropriate money for the acquisition of additional lands for conservation purposes; (4) prohibiting the legislature from abandoning, selling, or disposing of existing or future barge canals, and providing for the improvement thereof; (5) setting up certain restrictions with regard to the payment of claims against the state; (6) permitting the legislature to provide for low rent housing and slum clearance by authorizing indebtedness therefor; (7) improving the state budget system; (8) providing that the state shall bear all but a small part of the expense for the elimination of grade crossings; (9) allowing New York City to contract an indebtedness for the acquisition of its rapid transit facilities; (10) appointing referees in condemnation proceedings; (11) dealing with the jurisdiction of referees; and (12) authorizing the legislature to care for the needy, sick, aged, blind, etc.

Some "legislative" amendments were brand new, and were made parts of the constitution largely through the influence of interest groups. As examples of these may be listed proposals (1) prohibiting the legislature from authorizing municipally-owned utilities to earn less than a fair return on the value of their property; (2) making membership in any pension or retirement system of the state, or subdivision thereof, a contractual relationship; (3) enabling the legislature to provide for the transportation of children to or from school; and (4) providing for equal representation of both sexes on party committees.

The forty-hour-week provision of the labor amendment listed above may also be included in this group.

C. Borderline cases: The following amendments involve matters even more difficult than the foregoing to classify as "legislative" or "constitutional." These are given a separate status and include provisions (1) requiring the removal of public officers who, upon being called before a grand jury to testify concerning the conduct of their offices, refuse to testify or sign a waiver of immunity against subsequent criminal prosecution; (2) reapportioning the state's legislative districts; (3) improving the restrictions on municipal indebtedness and taxation; (4) facilitating the collection of village taxes; (5) modifying the method of appointing the adjutant-general and other military officers; (6) providing for the composition and improvement of the militia; (7) limiting the creation of public corporations (except city, county, etc.) and restricting the powers thereof; (8) improving legislative procedure; (9) concerning the registration of voters; and (10) the taxation article, which contains so much matter that is both fundamental and statutory in character that it defies inclusion in the above categories.

D. There is still another group of amendments that can not be fitted into any of the classes yet mentioned. It includes some nine or ten provisions whose effect was to weed out those paragraphs or sections of the old constitution which the passage of time had rendered obsolete. Their purpose, it was explained, was to "streamline" the constitution. Some of these affected such matters as state banknote issues, feudal and allodial tenures, and limitations on land leases and grants.

The above classifications may easily evoke reasonable differences of opinion as to their accuracy or value. They are presented here simply for the purpose of facilitating an analysis of the work of the convention. Unquestion-

ably, some of the amendments debated and adopted were safely fundamental in nature. And with equal certainty, one may take the position that others were of statutory significance alone. In view of the length of the old New York constitution and of the legislative material found therein, and in view of the intensive activity of interest groups seeking special favors at the convention, the addition of new statutory matter in the constitution was inevitable. In an editorial of July 9, 1938, *The New York Times* stoutly protested the tendency of the convention to devote a large part of its time to legislative questions.

The Constitution must be broad enough to work. Questions which are properly within the jurisdiction of the Legislature should be left to the Legislature. This applies to numerous . . . matters . . . which have been debated at the Constitutional Convention. We must not try to nail permanently into our basic law questions which the Legislature should be free to decide upon in accordance with experience and changing conditions

No careful observer of the American political scene expects constitutional conventions to confine their operations to fields described as "constitutional," however desirable that might be as an ideal. All the forces of a living, vigorous democracy—political parties, political factions, economic, social, racial and sectional groups—can be trusted to exert an irresistible pressure to secure consideration of pet projects. Their efforts at constitutional conventions may even surpass those expended at regular legislative meetings. Are the stakes not higher? Is not the victory, if won, more lasting?

The delegates themselves were not unaware of frequent encroachments upon spheres of legislative action. Repeatedly, the argument was put that certain proposals should be discarded as not of constitutional significance. In some cases this contention was made in all sincerity; in others the label "legislative" was bestowed upon a pro-

posal as a means of denouncing it when all other arguments were exhausted. The *Record* abounds with examples of the latter use of the charge and of instances where delegates objected to measures as "legislative" but were themselves guilty of sponsoring amendments of the very same character. Governor Smith, more than anyone else, sharply criticized the tendency to devote the convention's time to statutory matter. Opposing Senator Feinberg's proposal segregating for highway purposes funds raised by gasoline taxes, Smith stated:

This is a matter above everything else that has appeared so far during this Convention that should not be in the Constitution. It is not fundamental law. It can be attended to by the Legislature, and it should be attended to by the Legislature, and if the Legislature doesn't attend to it, there is no reason why this Convention should put any such thing as this in the Constitution.²

But Smith, it was charged, was not always consistent in his attitude on this principle. During the debate on the housing and slum clearance bill, Smith proposed an amendment exempting real estate from any additional taxes which might result from that feature of the bill raising New York City's constitutional debt limit two percent for housing expenditures. His amendment met strong opposition from Edward Weinfeld, New York City Democrat, who reminded the convention that Governor Smith had been foremost in advocating the doctrine that nothing of a legislative nature should go into the constitution.

Time and time again he has argued that point . . . to me it seems to be a reversal of the position he has taken here for weeks. . . . To me the exemption of real estate is definitely a legislative matter. It is straight-jacketing the Legislature, it is mandating

² *Record*, p. 1510. See also his speech supporting the proposal to remove the antigambling provision from the constitution because, as a proper subject for legislative action, it had no place there (*Ibid.* 812-818.)

the Legislature by indirection, or the local municipal body, by saying that they can or cannot raise taxes in a given or definite way.⁴

Weinfeld's attack irked Smith considerably and induced a long response justifying his position on real estate tax exemption. But there is little doubt that thereafter Smith was vulnerable to the charge that he made political use of the argument that a proposal was or was not legislative. Nor was he alone in this regard. The upstate bloc opposed to health insurance, when all other arguments failed, continually returned to the position that the question was one of legislative significance alone. Daniel F. Imrie protested that the legislature should not be ordered by the constitution to legislate into existence a scheme of health insurance; it was a matter for legislative discretion.⁵ He did not appear to be at all deterred from his argument by the fact that the entire social welfare article, of which health insurance was only a part, was unmistakably a "permissive" and not a "mandatory" provision.

Although many matters initiated, debated and passed by the convention were statutory, there is little question that the delegates in making this accusation were as frequently impelled by their desire to hoist one more barrier against a given proposal as they were by the urge to keep the constitution a repository solely for "fundamental" law. Lithgow Osborne, the state's Conservation Commissioner, aptly stated the case in his remarks on Senator Garey's amendment to the proposal requiring official publication of administrative rules and regulations. This amendment would have fixed a period of ten days after publication before such rules could take effect. The Com-

⁴ *Ibid.*, pp. 1630-1632. He reiterated his arguments in a later debate. See *ibid.*, p. 3087.

⁵ *Ibid.*, pp. 2211-2212. Delegate Arthur F. Sutherland opposed the measure because it was adequately covered by powers already in the hands of the legislature (*Ibid.*, pp. 2257.)

missioner declared that this was "a piece of obvious statute law" and attacked Garey for his inconsistency, pointing out that a few days before the Senator had opposed a section of the reforestation amendment (favored by Osborne) on the ground that it was statutory. Osborne's conclusion deserves notice.

I have heard also many other gentlemen of the legal profession say that we must streamline this Constitution, and have nothing in it that could be considered statute law.

It seems to me, it makes a great difference whose ox is gored, it is all a matter of interest and what particular interest a person has in a particular proposal.⁵

Such easy political uses of the argument that a matter was or was not of organic importance complicates the task of evaluating the work of the convention in terms of its devotion to legislative questions. However, as pointed out above, it is plain that many of the amendments passed were entirely or in part legislative in quality. Moreover, a good part of the convention's time was spent debating and defeating proposals whose effect would have been to add more legislative matter to the constitution. A number of these were bills which had gained committee approval; others were simply amendments to bills and were offered from the floor.⁶ Thus, though much that the convention did was fundamental in nature, one cannot escape the conclusion that it bore a striking resemblance to a typical legislative body; not only because it

⁵ *Ibid.*, p. 1025

⁶ Some examples of these are (1) Introductory 611, providing for the earmarking of funds received from gasoline taxes, (2) Introductory 688, providing for veterans preference in original civil service appointments; (3) Garey's amendment fixing a limit of ten days before administrative rules can take effect, (4) McCall's amendment to Introductory 231 on transit unification which would have made the five cent subway fare in New York City constitutionally binding; and (5) Garey's amendment to Introductory 657 on state taxation which would have prohibited capital gains taxes

provided a battle ground for conflicting political and economic groups, but also because the very materials it strove to make, or did make, constitutional were frequently not unlike those ground out by legislative mills throughout the country. In defense of the convention, it has been pointed out that the factors with which it had to contend—party politics, interest groups and an unduly long and legislative constitution—made this phenomenon inescapable.

At no time did the convention more closely resemble the state legislature than during its closing week. The scenes of hectic turmoil which mark the termination of a legislative session were reenacted by the convention as it entered the last few days of its existence. Most of the important constitutional amendments were jammed through during this period when the weary delegates, anxious to be off, were more amenable to compromise or political and economic pressure. On the very last day twelve separate constitutional amendments, many with innumerable subdivisions, were pushed through between the hours of ten-thirty A. M. and three-twenty-five P. M.⁷ The day before had seen the passage of seven constitutional amendments and the defeat of the bill for veterans preference in civil service.⁸ In all, the last six days of con-

⁷ (1) Suffrage (Introductory 681), (2) prohibition of "P. R." (Introductory 681), (3) equal representation of sexes on party committees (Introductory 693), (4) protection against suspension of writ of habeas corpus (Introductory 683), (5) creation of public authorities (Introductory 396), (6) local finances (Introductory 690), (7) future constitutional amendments (Introductory 694), (8) village taxes (Introductory 334), (9) testimony of public officers (Introductory 334), (10) self-government of villages (Introductory 253), (11) self-government of counties (Introductory 689), and (12) reapportionment (Introductory 692). It is to be remembered of course that most of these measures had received earlier consideration in committee of the whole.

⁸ (1) Transit unification (Introductory 231), (2) Judiciary (including the provision enlarging the power of the courts to review administrative rulings, and the proposal to create the tenth judicial district) (Intro-

vention activity resulted in the adoption of thirty-six important constitutional amendments. As late as July 25, little more than three weeks before adjournment, convention leaders were dismayed at the amount of work left on the agenda. Up to that point only the major items—grade-crossing eliminations and the searches and seizures clause—had been adopted in final form.

The legislative jam which developed the last week of July remained unloosened until the convention adjourned. The rush of work which this occasioned, coupled with the failure of party leaders to curb the activities of delegates submitting innumerable amendments from the floor, added greatly to the confusion of those anxious to understand the meaning and effect of measures upon which they were expected to vote. During the debate on housing and slum clearance on July 27, at which time eighteen amendments were offered from the floor and passed, Senator Feinberg arose to complain of the difficulty he was experiencing in trying to follow what was transpiring.

Now, I am frank to say, and I do not believe I am over-stating it, I doubt whether fifty per cent of the delegates understand what this is all about, after listening to all of this talk. I would like to know if there is anybody who is interested in this proposition who can in three minutes give us a plain concise statement of what this means, and how it will affect the taxpayers of the State of New York. If there is such a person here, not only myself, but I think a majority of the delegates here would appreciate it."⁹

Other examples of individual revolt against hasty and ill-considered action are not lacking. Reference has already been made to the outburst of ex-Senator Joseph McGinnies who protested that the treatment accorded the

ductory 691), (3) three social welfare articles (Introductory 685, 686, 687, and (4) two provisions dealing with condemnation proceedings (Introductory 664, 684).

⁹ *Record*, p. 1737.

social welfare, housing, judiciary and home rule proposals was haphazard and ill-advised. He was afraid that "the people of the State of New York will think there hasn't been much deliberation or consideration given to the propositions that are going to be submitted."¹⁰ Delegate Ernest D. Leet believed that the rush of amendments and debate on the veterans preference bill was "a sad commentary upon the haphazard way that we are going about in writing this Constitution."¹¹

Though the point is well taken that much of the confusion attending the deliberations during the last three or four weeks was a product of relatively inefficacious party leadership, part of the difficulty must be attributed to the great volume of issues clogging the convention's calendar and machinery. It is an old legislative habit. Few representative bodies escape a great rush of work just prior to adjournment. The natural human tendency to procrastinate is chiefly responsible, but less excusable explanations are not entirely without foundation. Political and economic interests have been known deliberately to put off until the last moment any consideration of given legislation in the hope that the turmoil and pressure of end-of-session activity will obfuscate maneuverings ill-suited for open publicity. Throughout its first four months the convention did little but attend to matters of patronage and political skirmishing and await the action of its committees. Not until the last four weeks did it come to grips with the principal issues of the day. During that time the tempo of its activity and accomplishments continued to accelerate, until by closing time convention leaders and delegates were both bewildered and out of patience. At one point, following an explosive scene on the floor, President Crane called the proceedings a farce, and threatened to adjourn the convention on the spot.¹²

¹⁰ *Ibid.*, p. 2252.

¹¹ *Ibid.*, p. 2385.

¹² *The New York Times*, August 12, 1938. For this particular episode

It was in this atmosphere of tension and confusion that interest group representatives achieved their greatest successes. Moreover, this period witnessed little regard for party ties on purely economic issues. Only when questions involving immediate political advantage were under review did party loyalty predominate. Taking advantage of the disorder created by the overwhelming stream of bills and amendments thereto, discordant elements crossed party lines in search of natural levels. Conservatives of both parties were especially alert to their opportunities. Relieved of leadership pressure, their true preferences were laid bare and in extra-party coalition they dominated the convention until its last day.¹⁹ The extent of their control can be measured by the record of the convention on several proposals during this period: (1) proportional representation was banned throughout the state; (2) the legislature was prohibited from requiring municipally-owned utilities to set up yardstick rates; (3) undivided profits taxes were banned and a provision admittedly designed to protect state banks from certain taxes was written into the constitution, (4) the Smith amendment to the housing bill, relieving real estate of at least part of the burden created by the financing of a housing program, was approved by a substantial majority; (5) the Poletti bill, reserving to the state greater control over its water power resources, was defeated; and (6) health insurance, after once being voted down, was only salvaged after Chairman Corsi had insisted upon a record rollcall.

As has been indicated in the foregoing pages, a critical

see the *Record*, pp. 2721-2732. Because of the strain of overwork one of the delegates broke down and cried at his desk when other delegates expressed impatience at his attempt to explain his vote against veterans preference. *The New York Times*, August 20, 1938.

¹⁹ *The New York Times*, August 10, 19, 20, 1938. It was the opinion of Warren Moscow that one of the outstanding features of the convention "was the virtual bloc voting of up-State Republicans and the organization Democrats from New York City." (*Ibid.*, August 21, 1938.)

observer attending meetings of the convention could easily have imagined himself witnessing the proceedings of the state legislature. The similarity was substantially marred only by three notable differences: the convention was a unicameral body; its leadership was less potent; and it was legally unlimited as to subject matter. In practically every other respect—motivations, directive forces, techniques, and accomplishments—it adhered to the usual legislative pattern. Patronage politics, inter-party struggles, divisions within parties, rural-urban cleavages, personal political ambitions, pressure group operations within and without the convention membership, consideration and adoption of legislative matter and the end-of-session legislative jam were inextricable constituents of the constitutional convention. In brief, all the attributes enjoyed and suffered by American representative assemblies, attributes perhaps inseparable from the democratic process, were constantly in evidence. Such is the "voice of the people," whether expressed through the legislature or the constitutional convention.

CHAPTER VIII

CONSTITUTION-MAKING RETURNS TO THE SOVEREIGN PEOPLE

The constitutional convention, as an instrument for constitution-making, is unique in one respect. As a body, it has but a "single task" to perform, for which it is to be held responsible by the public. The proposals adopted must be referred to the electorate for review and judgment. The delegates to New York's eighth constitutional convention were continuously conscious of this fact. "Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention." These were the words of their constitutional mandate. The convention, and all its members, were tagged with a direct responsibility in a way that a legislature submitting an amendment to the electorate was not.

This institutional responsibility was inescapable, but it was maneuverable. We have already discussed the willingness of the political parties to have the convention *establish its own responsibility*, without their "outside interference." The meaning of this, as we have pointed out, was that parties would "look out for their own interests" (patronage, reapportionment, favorable relation to the mood of the times), but would not take over the responsibility for the convention's decisions on policies or its work as a whole. By this line of division, the convention was not the responsibility of any political party as such. While the details of achieving, in actuality, such a divi-

sion of labor were complicated and continuous, the political parties were at least clear on their main objective.

For the convention itself to establish its own responsibility, in practice, there was no equally clear objective. It was an *ad hoc*, short-lived institution of doubtful parentage—disowned by political parties and ignored by a majority of the people when the decision on the calling of the convention was being made. While lip-service and verbal loyalty were paid to the symbols of constitution-making, the basis for responsible action (on the part of the convention) was obscure, if not lacking. Editorial writers could declaim that "Not since the Revolutionary Convention of 1777 has there been in this Commonwealth a greater opportunity for statesmanship," but how translate the opportunity into meaningful, concrete terms?¹ The reaffirmation of loyalty to the values of self-government and of constitutionalism did not clarify the task of the convention nor organize it for high achievement. The widespread appeal to the abstract symbols of constitution-making may even have added to the confusion. The delegates were full-armored and morally determined to slay the dragon—but was there really a dragon?

What was the mandate of the convention, in view of the details of its origin? The answer to this question was left vague, amid discussions of abstract power and moral exhortations to make worthy use of that power. Thus, says a *New York Times* editorial, the convention could, "if it desired, discard the present State Constitution entirely and submit an entirely new one."² A more realistic and conservative note was struck by the Secretary of State, in opening the convention: "It is your duty to study our present Constitution, realizing that although the economic situation has changed and the State has grown in population and wealth, and the needs of the people are most complex,

¹ *The New York Times*, April 4, 1938.

² *Ibid.*, Feb. 26, 1938.

still we have prospered and the people have been happy under this Constitution for many years. Therefore, although you have been elected to propose and submit revisions and amendments to the Constitution, you will do so remembering the traditions of this Empire State, and that this Constitution has grown up with the State and has been made by the people." President Crane followed him with the solemn admonition that they should be guided by the fundamental principle that "there is no value in change just for the sake of change."³

The techniques of constitution-making were equally obscure. The delegates, as we have seen, had been chosen with reference to the politics of party and locale. They were now charged to "keep politics out" of their deliberations and actions. This charge springs from the "dignified" level of constitutionalism. It would not do to say that the moral persuasiveness of such appeals was entirely without influence. Nevertheless, they certainly could not dominate the convention. At times they merely provided a convenient smoke screen for the gap between the abstract ideal of constitution-making and the politics of human self-government. In so far as the ideal disregarded the latter, it complicated the task of the convention and left it confused as to the basis for responsibility.

The charge that only "fundamental law" be put into the constitution illustrates the same point. There was brave talk of "streamlining" the constitution. Attention was called, by the press, academicians and the more "public-interest" pressure groups, to the importance of putting only "fundamentals" in the constitution. The New York State League of Women Voters appealed for a short constitution embodying only basic principles of governmental organization. But the constitution which the Secretary of State bade the delegates change with utmost caution was already filled with detail. Over the years the constitution

³ *Record*, pp 4, 9.

had grown from a few thousand words to around thirty thousand. As we have pointed out, this accumulation of detail has not reflected an effort to introduce only basic principles. Throughout the 1938 Convention (as in earlier ones) the charge of putting statutory matter in the constitution was used for particular moves of attack and defense, the while old detail was amended with new. The resulting constitution was longer by some twenty thousand words.

The closing days of the convention brought further evidence of this confusion as to objectives and techniques. Its failure to establish a solid basis of responsibility was demonstrated by the serious consideration of an "all or none" submission of the work of the convention to the voters. This showed the maneuverability in detail of the "inescapable public responsibility." Had the fifty-nine proposed amendments been lumped together, the convention might have protected itself from a discriminating public judgment. By such strategy the convention might have avoided suffering the full consequences of its failure to establish its own responsibility. Appropriately, it was public outcry, as much as the dissuasive arguments of convention members, which caused this project to be abandoned.

The Convention of 1938, New York's eighth, might well be called the "Committee on Detail." Lacking both a clear, urgent public mandate and responsible party leadership, it opened its doors to the particular interests. It submitted itself to the *articulate* "will of the people." As recorded above, a *New York Times* correspondent reported his impression that the convention was dominated more by pressure groups than had been any recent session of the legislature. In so far as the convention found its basis of responsibility, it found it in providing a hearing for as many interested parties as cared to put in an appearance. During the debates at the convention, some

protests were made that the proposals reported out of committee were being subjected to too many changes from the floor. Parliamentary Joseph McGinnies deplored this as nullifying the deliberative efforts of the committees, but was reminded that the convention was "not a legislature." Others protested, too, but against changes which went contrary to the action of committees after hearing the wishes of affected groups. The convention functioned as a clearing-house for particular interests (public and private) and was hardly able to rise above the involved detail. As a body the convention remained inchoate and unpredictable.

In analyzing the reaction of the public to the convention, it is valuable to know something of the kinds of proposals the convention did not pass. In sifting the individual proposals down from 694 to the 76 which came out of committee, what was the process of inclusion and exclusion? From our previous discussion, we have given the picture of what the public was to pass upon. The full picture of the work of the convention necessitates some consideration for the matters which did not find favor with it (as it worked in committee).

The tone of the convention was that of a middle-of-the-road conservatism. Despite remarks about the full power of the convention to make and un-make, the convention itself was not disposed to view its mandate in those terms. On the positive side, it combined concern for "sound public finance" with measures (housing, social welfare, transit unification) which meant the expenditure of considerable sums of money. On the negative side (with the prevailing temper much more negative than positive), it resisted proposals for changes in governmental structure as well as those offered in support of general objectives. Changes in detail but no substantial deviation from the existing setup suited the mood of the convention.

Many "non-political" interest groups sought to make

the reorganization of the legislature an issue. A unicameral legislature, elected by proportional representation, was urged upon the convention.⁴ A proposal to achieve this was introduced by Judge Poletti, spokesman for the American Labor Party.⁵ In a signed article in *The New York Times* before the convention opened, the issues were discussed by one of the delegates, Harold Riegelman. On the matter of unicameralism he had this to say: "Inasmuch as the question is moot and sixteen delegates, being members of the State Legislature, have a decided interest in the existing arrangement, the chances for a unicameral legislature are not good." The matter failed to emerge from committee. Several delegates introduced proposals for electing the Assembly by proportional representation. The convention voted instead to ban P. R. for cities, the only place where it was in use or seriously considered.

Very little attention was paid to giving the electorate more direct access to their government. Nor was more interest shown in the initiative, referendum and recall than in unicameralism. Isolated proposals for legislation by popular petition and referendum, or for referendum upon acts passed by the legislature, were ignored. Several delegates introduced proposals which would have applied the initiative and referendum to constitutional amendments.⁶

These proposals also died in committee. On the other side, a handful of delegates gave expression to the thought that the voters were not fulfilling their civic responsibilities under powers already granted. Five delegates sought to raise the level of popular participation necessary for

⁴ Some groups urging such action were the National Municipal League, the Merchants' Association of New York, the Citizens Union, the Women's City Club of New York, the City Fusion group.

⁵ A proposal for a unicameral legislature, without proportional representation, was introduced by Judge Harlan W. Rippey.

⁶ This proposition had the support of the American Labor Party and the New York Federation of Labor. Their respective spokesmen, Poletti and Dunnigan, introduced them.

the ratification of amendments to the constitution. To do this they would have required that the number of voters voting on an amendment be at least one-half the number voting for assemblymen (or governor).⁷ Two delegates advocated similar stiffening of the required popular participation in the calling of a convention. They would have required that the number of those voting on the convention be equal to at least one-half those voting for governor. One of these delegates would have gone further in this matter of popular participation, by disqualifying electors for two successive failures to vote. All these proposals received treatment similar to that accorded to those which would have given the voters more, rather than less, opportunity—none emerged from committee.

On the administrative side, numerous proposals to reintroduce the elective principle for heads of departments went unattended. So did proposals to create new departments. A department of the consumer and a department of justice failed to materialize (along with a department of real estate and mortgages and a department of professions). On the positive side, the administrative process was brought closer to the courts through the Whalen amendment; but various more or less drastic proposals concerning the operation of administrative rules came out in the mild form of a requirement that they be filed with the secretary of state before becoming effective. A proposition that the governor and the legislature be more openly related, by giving the governor the right to sit and to introduce bills in the legislature, died in committee. Two proposals (introduced by ex-Governor Smith and Mrs. Helen Rodgers) which would have subordinated legislative initiative in law-making to that of the governor likewise failed to arouse the interest of the convention.

⁷ Intr Nos., 151, 157, 274, 406, 579. Supreme Court Justice Bergan advocated the highest figures, requiring a majority vote on amendments equal to a majority of those voting for assemblymen.

In matters referred to the Bill of Rights committee, an equally negative selectiveness prevailed. Of sixty proposals referred to it, nine were reported out and seven adopted. These consolidated existing statutory ground, rather than breaking new. More explicit coverage of subversive activities met with as little success as did efforts to put teeth in a non-discrimination article which hit at discrimination by private employers and operators of business open to the public. On the moral level, efforts to remove the constitutional prohibition on legalized gambling could not surmount upstate resistance, although this matter did come out of committee for open debate. A half dozen proposals for lotteries, to aid the financing of relief or housing, died in committee. Proposals to extend freedom of speech and press to the cinema and radio were left in committee, as were several which declared the inalienable right to assemble, to petition and to distribute literature.

The concern of the convention delegates for legalistic detail is perhaps illustrated by the relative interest shown in introducing proposals. There were seventeen proposals offered which were concerned with housing. These were offered by twelve different delegates (only one of them from outside New York City). There were nineteen separate measures concerned with "social welfare." These were introduced by nine delegates (only one of them from outside New York City). On the other hand, fifty-eight delegates turned in the record number sent to any one committee, one hundred fifty-two on the judiciary. On the organization of the legislature, twenty-nine delegates introduced forty-three proposals, half of which were concerned with reapportionment—a matter which was handled virtually outside the convention by the majority party.

The amendments adopted by this "committee on detail" were to be passed upon by the electorate at the time of the November elections. As previously discussed, the

bulk of the detail was lumped together as "non-controversial" and submitted to the people as Amendment No. 1. This "amendment" related to all but two of the fifteen articles of the existing constitution, and to four new articles. It was an aggregate of unrelated matters somewhat uneasily bound together by the label "non-controversial." Amendment No. 2 carried the Republican party's compromise (within itself) between "permanence" (apportionment favorable to the party) and "change" (in population figures) in the matter of legislative apportionment. The detail of this amendment was thus held together by a "principle" readily apparent to the voters. Amendment No. 3, referring to grade-crossing elimination, substituted new detail for old by changing the policy of financial responsibility for such elimination which had been put into the constitution in 1925. Amendment No. 4, introducing into the constitution a provision on housing, was a hybrid, in that it included both a broad general grant of power and a specifically detailed legislative authorization as to a housing policy. Amendment No. 5 represented fairly extensive and detailed changes in the judicial system, together with the two so-called "political jokers" (tenth judicial district and appeal from administrative agencies on both facts and law). Amendment No. 6 was another hybrid; it contained both a broad general principle of the rights of labor and a specific provision setting wages and hours on public contracts. Amendment No. 7 carried the convention's revolt against the use of proportional representation (thus qualifying existing home rule arrangements). Amendment No. 8 authorized the use of state funds for broad, social welfare purposes. Amendment No. 9 represented another change in the fiscal policy detailed in the constitution; it allowed New York City to incur indebtedness up to 315 million dollars, without regard to its legal debt limitation, in her project of transit unification.

A proposal had been submitted to the convention which concerned itself with the problem of educating the public before constitutional amendments were passed upon. By this provision, amendments proposed by a convention would be submitted separately at a special election, to be held not less than three nor more than six months after the convention adjourned. The argument was that constitutional amendments should be segregated from other matters and be given exclusive attention. In contrast to this procedure, the proposed constitution of 1938 was launched on an already crowded political sea. All of New York's voters were to vote for two United States Senators. Closer home and even more absorbing was the race between Thomas E. Dewey and Governor Herbert Lehman for the first four-year gubernatorial term. A full slate of state-wide officers was to be elected. In addition, the voters in the respective districts were to choose state senators and assemblymen, and forty-three U. S. congressmen. In New York City there were also a number of judicial offices being filled. Before the convention opened, *The New York Times* editorialized regretfully that the presidential election of 1936 and the more exciting issues of 1937 had overshadowed the convention issue from the start. The work of the "committee on detail" seemed destined to be equally caught in the shadow. This shadow was perhaps lengthened by the legalistic formalism of the "due notice" publication. In accordance with state law, changes in the proposed constitution were published in newspapers throughout the state. A carefully prepared text indicating additions, deletions and rearrangements was thus publicised at a cost of \$700,000. The print was so small and closely packed, however, that the reading of it was unlikely, if not impossible.*

* The official text in *The New York Times* was two and a half tightly woven pages, twenty closely packed columns. Commenting on a somewhat disillusioned editorial in the *Times* on the failure of the people to inform

The projected constitution was rolled into the display room on August 26 and the doors of the convention closed behind it. Now it was time for the sovereign people to speak, in approval or disapproval. The decision of the convention to submit nine proposals (decision on this matter having been put in the lap of the Republican party leaders by President Crane) indicated something of the tactic the major political parties would use. The work of the convention would not, in its entirety, become a partisan issue. The two amendments representing clear Republican party victories (reapportionment, and the tenth judicial district coupled with the "anti-bureaucracy" slap at the New Deal) would provide the bone of contention between the two parties. The omnibus amendment (No. 1) would be supported by both parties, inasmuch as to condemn it would be virtually to condemn everything done by the convention. Housing and social welfare would be claimed by both parties (although this would not preclude continued upstate opposition at the polls). The situation in regard to the ban on P. R. was still confused; increasing public outcry against it, and the importance of New York City to both parties, made it doubtful that either party would back up the coalition move which had effected it. The official stand of the Republican party would depend somewhat on its candidate for governor. The convention having failed to operate as an incubator in this matter, it seemed likely that District Attorney Thomas E. Dewey would get the nomination. In this case, Republican strategy would be oriented particularly toward New York City.

When the two parties held their state nominating conventions towards the end of September, the constitutional

themselves, a reader wrote "Do you think it possible that there are many people gifted with ordinary eyesight who would attempt to read a long-drawn article describing those amendments printed in the type used for that purpose?" Dec. 17, 1938

issue was thus held on the periphery of the political arena. The Republicans were willing to let it fade into the background while the Democrats squeezed from it as much as possible of credit for themselves and discredit for the Republicans. Their respective state platforms ran as follows:

*(Democrat)**Constitutional Convention*

The constitutional convention presented a rare opportunity for substantial achievements in public interest. The Republican party dominated the convention. We regret that under its partisan leadership and control, the convention failed the people in many vital matters.

The Republican party, motivated by a desire to gain selfish partisan advantage sacrificed the integrity of the State judicial system, and destroyed the basic American principle that the people are entitled to fair and equal representation in the Legislature.

The proposals for slum clearance and low-cost housing, social welfare and labor's bill of rights were adopted only through the persistent and determined efforts of the Democratic leaders and Democratic delegates.

The delegates of our party vigorously attacked the partisan political scheme of the Republican party to submit the entire Constitution as one proposition. Only because of our successful insistence on separate submission are the people now afforded the opportunity of approving certain good parts of the proposed Constitution without being compelled to swallow the bad ones.

*(Republican)**State Constitution*

Although proposed constitutional amendments are not issues involved in the election of State officials, the Constitution is the fundamental law of the State and changes in the Constitution should have the most careful consideration of every voter. We commend the painstaking and conscientious work of the Eighth Constitutional Convention. We urge support of

1 The General Amendment

This amendment consists of fifty

No. 1. (General Amendments)

For its safeguards of the civil rights

(*Democrat*)

Constitutional Convention

independent propositions adopted by the convention and not included in the other eight amendments submitted. After balancing the merits of individual propositions we recommend an affirmative vote

2 Legislative Apportionment

The Democratic Party, unreservedly condemns this proposal, which instead of correcting inequality and injustice, aggravates those evils.

Our American system of government is predicated upon the doctrine of fair and equal representation of all.

This proposal flouts that principle and is a brazen departure from every concept of representative democracy.

The immediate injustices in this plan are mild compared with the monstrous design for future reapportionments.

It is a known fact that this proposal is not the product of the delegates' deliberations, but the notorious work of the Republican political machine. It is designed to perpetuate minority control of government by constitutional mandate.

We urge all citizens, regardless of party to vote against this amendment.

If this proposal is rejected by the people we pledge ourselves to provide for a prompt reapportionment of the legislative districts throughout the State so as to give those counties which have increased so tremendously in population since 1917, a fair and adequate representation. We recognize the right of each county (other than Fulton and Hamilton, which are considered as

(*Republican*)

State Constitution

and liberties of the people, its reinforcement of the administrative efficiency and financial stability of the State and local governments, and its orderly, logical rearrangement of the Constitution.

No 2 (Apportionment) For its fair and sound adjustment of representation in the Legislature long overdue because of the great shifts of population to the metropolitan areas in the past twenty years.

220 CONSTITUTION-MAKING IN A DEMOCRACY

(Democrat)

Constitutional Convention

one) to have at least one representative in the Assembly. We repeat our recommendation to vote "No" on this proposal

3 Grade-Crossing Elimination

We hold with the unanimous opinion of the convention that this proposal will expedite grade crossing eliminations. We recommend its approval.

4 Slum Clearance and Low Renting Housing

We are proud that our Democratic national and state administrations were the first to launch a program to eliminate slums and provide decent homes for low income families. Last year Governor Lehman recommended and the legislature passed a constitutional amendment for this purpose. Moreover, it was the votes of our Democratic delegates in the constitutional convention which assured the passage of this amendment.

We recommend a vote of "yes"

5. Judiciary

Because of two sections which we consider undesirable we recommend disapproval

One section would seriously hamper the operations of many administrative departments, boards and agencies and greatly impair their efficiency. It would also overburden the courts and increase their cost to the taxpayers.

The other objectionable section creates solely for partisan political purposes an additional Supreme Court district comprising Nassau and Suffolk Counties. This same proposition was rejected by the peo-

(Republican)

State Constitution

No 3 (Grade Crossings)—Because it furnishes a practical means of hastening the elimination of dangerous railroad grade crossings throughout the State

No 4 (Housing)—For its fair, practical and immediate approach to the urgent problem of low-rent housing and slum clearance.

No 5 (Judiciary)—for its reorganization of the judiciary system and for its recognition of the basic right of the people to an impartial review of arbitrary orders or rulings by administrative officials.

(Democrat)

Constitutional Convention

ple a few years ago; circumstances have not changed since then. The proposal is a vicious encroachment on the non-political judicial system of the State. We urge the people to vote 'no.'

6 Labor

This amendment guarantees to labor certain fundamental rights which have been advocated in Democratic platforms for many years. We recommend its approval.

7 Proportional Representation

While persons differ as to the merits of electing local officers by proportional representation, we believe that determination of the method of election is a matter of local concern.

Our party has always taken the lead in extending the principle of home rule. Writing this amendment into the Constitution would be a denial of that principle and we do not recommend its adoption.

8. Social Welfare

This proposal authorizes the Legislature to provide food, care and support for the needy and to protect them by insurance or otherwise against hazards of unemployment, sickness and old age. We recommend a vote of "yes."

9. Transit Unification

Since this amendment was prepared and recommended by the administration of the City of New York and the Transit Commission, we favor its adoption. We also favor the continuance of the five-cent fare. We recommend its approval.¹

(Republican)

State Constitution

No 6 (Labor)—Which writes into the Constitution the basic rights of labor.

(Not included under 'we urge support of')

Although the convention expressed through Amendment No 7 strong disapproval of voting by proportional representation, we feel that regardless of the merits of such system, the amendment is contrary to the principles of home rule, and we do not urge its support.

No 8 (Social Welfare)—Which would remove any doubt as to the power of the State to use its money or credit for welfare purposes including protection, by insurance or otherwise, against the hazards of unemployment, sickness or old age.

No 9 (Transit Unification)—Which will make possible the unification of transit facilities in the city of New York.

¹ Taken from *The New York Times*, Sept. 30 and Oct. 1.

The fact that, of the two platforms, the Democratic reads with the bold (and extravagant) assurances of a political speech reflects greater organization unity on the major issues. The modest reticence of the Republican platform conceals, for obvious political reasons, the disagreements within the party. The almost identical disclaimers on P. R. represent the triumph of party organization over those (in both parties) who had flaunted it in convention.

This reduction of the political disagreement, between the two parties, over the work of the convention was carried further by Thomas E. Dewey, Republican candidate for governor. Despite the stand of his party, he repudiated the proposed judiciary article (No. 5), basing his objection largely on the "anti-bureaucracy" provision. The provision, he asserted, was so broadly drawn that it would permit a judge to interfere with and delay the effective administration of the laws of the state. While conceding the "growing evil" of the "tyranny of bureaucracy," Dewey declared that the problem in New York state should not be confused with that in Washington. Proper judicial review, he concluded, could be obtained without so seriously damaging administrative work.¹⁰ His opposition to the ban on P. R. (No. 7) he stated much more emphatically than the platform of his own or the Democratic party, calling it a highly objectionable violation of the basic principles of home rule. On the reapportionment plan (No. 2) he went along with his party, calling it an improvement and the best plan the delegates were able to work out. Dewey's qualification of the official party stand put him on the side of the down-state "liberals" within his party. No such serious cleavage of leadership showed up in the Democratic party.¹¹

¹⁰ Statement issued by Thomas E. Dewey, as reported in *The New York Times*, October 10, 1938. He also opposed the section in No. 5 which made the Municipal Court of the City of New York a constitutional court, a proposal which had been recently defeated at the polls.

¹¹ The Democratic County Committee of Queens did endorse the re-

While the two major parties had succeeded in relegating the work of the convention to a political back-seat, public "education" in detail was taken up by the multiplicity of groups interested in it.¹² The three minority parties (American Labor Party, Communist Party, Socialist Party) agreed, in that they approved without qualification only transit unification (No. 9) and gave very qualified, grudging approval to housing (No. 4), labor (No. 6), and social welfare (No. 8). The convention was denounced for the reactionary party politics which dominated it. Charles Poletti, Democrat and spokesman of the American Labor Party at the convention, was careful to stress in his report to that party that the Republicans were the cause of the convention's failure. LaGuardia called the convention a "lost opportunity." *The New York Times* editorialized that no one could say the convention had done a first class job; it had neither simplified nor abbreviated the constitution, nor had it drawn a careful line between principles, which belong, and practices, which do not belong, in the constitution. Nevertheless, the editorial went on to call the voters to their hard task of trying to gain an understanding of the proposals before November 8 and proffered the help of subsequent editorials.

Some of the "non-political" groups offered the "if in doubt, vote no" advice. The Citizens Union opposed, as "major threats to good government," four of the amendments (No. 1, omnibus; No. 2, reapportionment; No. 5, judiciary; No. 7, anti-P. R.), condemned mildly grade-crossing elimination (No. 3), and gave mild approval to the remaining four. If the voter should have difficulty in

apportionment proposal (as had the Queens delegates at the convention) because of the increased representation accorded them

¹² The following discussion is based upon materials made available directly by such organizations as the National Municipal League or the Citizens Union or reported in the press (primarily *The New York Times* and the *New York Herald Tribune*.)

remembering the numbers, a "no" vote on everything would result in much good and little harm. The City Affairs Committee took a similar stand. It endorsed the same four (housing, labor, social welfare and transit unification), while saying that they fell short of what the convention should have submitted. No great calamity would occur if all were defeated, the Committee concluded, as every liberal and thoughtful citizen should view the results of the convention with unqualified disapproval; the delegates, for the most part, were guilty of a serious breach of public trust in allowing politics to dominate the convention. When an American Labor Party speaker, before a meeting of the New York Teachers Guild, followed this line in saying that he would have no regret if all were voted down, ex-delegates Corsi and Poletti took sharp issue. Both insisted that much good could be salvaged. The Women's City Club came out in support of the same four, while expressing disappointment at the results of the convention. The Joint Committee of Teachers Organizations sent a bulletin to the public schools in New York City, announcing their complete success in protecting its members' interests and in defeating every threatening proposal. The Bronx Borough Taxpayers League recommended total rejection, because of the danger to taxpayers. Former-Governor Alfred E. Smith, speaking before members of the New York County Lawyers Association, approved most of the amendments but strongly disapproved the convention method of constitutional revision. The convention idea is wrong, he asserted, because it becomes a legislative body, subject to all the same political pressures and divisions.

The first, or "omnibus," amendment offered the greatest possibility for variations in attitudes. The Brooklyn Real Estate Board opposed it, because of the provision putting pensions on a contractual basis. The Real Estate Board of New York supported it, because the tax provisions were

held sufficient to outweigh the bad items in the amendment. The directors of The Real Estate Taxpayers Federation, Inc., were opposed, declaring that there was too much of a legislative nature in it and that the bad points outweighed the good. The Citizens Budget Commission of New York City supported it, because of its financial provisions, as did the Merchants' Association. The executive committee of the New York Real Estate Association supported it. Martin Saxe, a delegate, recommended it because of the provision putting pensions on a contractual basis. The City Club disapproved because of the same provision. The American Labor Party attacked it for its restrictions on the taxing power, its inroads on home rule and its continuation of useless county officials. The Conference of Mayors approved it, because of its home rule provisions. A group of the New York City National Lawyers Guild disapproved because of the too rigid restrictions on local taxation. The New York State Federation of Labor (AFL) supported it because of the benefits to be derived by labor. The New York State Industrial Union (CIO) opposed it, because it favored the rich and put hopes for municipal power developments in a strait-jacket. The League of Women Voters disapproved, saying the contents were almost entirely legislative. The American Defense Society disapproved, because of the grand jury provision. The Grand Jury Association of New York County called attention to the aids to grand jury action to be found in it. The American Civil Liberties Union opposed it, because of its violation of the principle of separation of church and state. Bishop Manning denounced it as a hopeless hodge-podge and took particular exception to the provision for free transportation of school children to private (including church) schools. The Baptist Ministers Conference opposed it for the same provision. The Central Committee of Catholic Laymen distributed cards throughout New York City, urging its

support (along with Nos. 4, 6 and 8). Monsignor J. Francis H. McIntyre, chancellor of the archdiocese of New York, said that this action was being urged upon Catholics throughout the State. Mayor LaGuardia opposed the amendment, specifying his objection to the sections on water power and on setting up a State Board of Tax Appeals. Thomas E. Dewey urged its support, mentioning favorably the provisions for free transportation for school children, the waiver of immunity from testifying by public officials, the guarantee of equal protection of the law, and the assurance of care and support for the needy. The *New York Herald Tribune*, in an editorial, declared it to be practically impossible to evaluate this amendment, because of the variety of unrelated matters, some good and some bad. "But," the editorial concludes, "if the decision is in favor of No. 1 we think that, on balance, it will be the right one." *The New York Times*, however, took the contrary stand. Rather than attempt to weigh the good in relation to the bad, the voters should flatly repudiate the undemocratic method of presenting so many unrelated proposals for a single choice. No encouragement should be given to such a procedure on the part of this or any future convention.

The so-called labor amendment (No. 6) furnished the occasion for a division of opinion ostensibly along lines of fundamental law versus legislative detail. The amendment contained two declarations of principle (labor not a commodity, and right of collective bargaining), but added to these a provision for an eight hour day, five day week at the prevailing wage for public contracts. Its separate submission was the result of a maneuver by Senator Dunnigan, spokesman for the New York Federation of Labor at the convention. The nature of the dilemma presented is well illustrated by the differing editorials in *The New York Times* and the *New York Herald Tribune*. The *New York Herald Tribune* advocated the defeat of

the amendment on principle, because of the inclusion of the wages and hours section. The rest of the amendment, it held, was properly constitutional, although it only wrote principles into the constitution which were already generally accepted and acted upon. The New York State League of Women Voters took a similar stand, as did the Merchants' Association of New York, the City Club, and the directors of the Real Estate Taxpayers Federation, Inc. The Brooklyn Real Estate Board voiced their disbelief in special rights for any other class of citizens. On the other hand, *The New York Times* pointed out the possible uses of this bivalence. While disapproving the inclusion of the challenged detail, the *Times* felt compelled to advocate approval of the amendment because its defeat would be an unwise blow at labor, whatever the importance (and genuineness) of the stand on principles.

The situation was similar in regard to the housing amendment (No. 4). Delegate Baldwin, who had sponsored the LaGuardia Administration proposal on housing at the convention, had declared it amended beyond recognition. Nevertheless, he and others interested in housing urged its adoption as a reasonable and prompt beginning, despite its deficiencies. Housing groups, civic groups generally, charity organizations, as well as the LaGuardia administration and all political parties, gave it hearty support. Three days before the election date, United Neighborhood Houses, Inc., and the Citizens Housing Council arranged a tour of the slums to create last-minute interest. This climaxed a campaign of platform and radio talks by prominent speakers, either independent or spokesmen of groups concerned with housing. The real estate associations were generally opposed. The Executive Committee of the New York Real Estate Association held that the amendment would not achieve the desired results, although action under it would not conflict with private enterprise. The Real Estate Board of New York held it

discriminatory in relation to property. The directors of the Real Estate Taxpayers Federation, Inc. announced that their study of the consequences, in the real estate field, of government subsidies competing with private enterprise forced them to oppose.¹³ The debates at the convention revealed an upstate opposition, some of which could be expected to register itself on November eighth. No candidate for state-wide office, however, would take such a public stand.

While public attention was concentrated primarily upon the allegedly "political provisions" of the proposed judiciary amendment (No. 5), various groups expressed disapproval on other grounds. The Merchants' Association of New York held that the outstanding defect, the manner of nominating and electing judges in the metropolitan area, still lacked a remedy. The City Club opposed it on the same ground, as well as for its making the Municipal Court a constitutional court. The Brooklyn Real Estate Board found this latter point the chief objectionable feature. The Bar Association of the City of New York issued a detailed criticism of the amendment, including the provision for judicial review on the facts as well as law. Judge Sears, on the other hand, who had opposed both the "political" sections in debate at the convention, felt that the amendment should be adopted. He held that the courts could be trusted not to avail themselves of the opportunity to enter the broad domain of review of technical facts on appeal from administrative agencies. As pointed out above, Dewey declined to follow his party's platform on this point and came out flatly in opposition.

¹³ The line-up on No. 8 was similar, except that there the issue of church and state again entered because of the extension of public welfare services to private schools. For this reason, those groups recorded as having opposed No. 1 on this ground (American Civil Liberties Union, Evangelical Lutheran Synod of the Atlantic District, The Long Island Baptist Association, the Baptist Ministers Conference of New York) also opposed No. 8.

Probably the greatest public reaction on the "indignation level" was that expressed over the cool crassness of the ban on proportional representation. The president of the Women's City Clubs referred to it as "disgraceful" and "shocking." A Committee of 500 to Save P. R. was formed and announced an intensive campaign. One million stickers were to be distributed. The fight was to be carried to the party nominating conventions. Candidates were to be circularized for their stand on the issue. The research director of the Merchants' Association urged, in a radio address, that this attempt on the part of Tammany to recapture control of New York City be soundly defeated. A State Committee for Home Rule on P. R. was formed to work against the amendment, in cooperation with local committees already operating over the state. Harold Riegelman, prominent New York City Republican, who wielded considerable influence at the convention, said he would rather see the whole constitution defeated than to have No. 7 win. George Hallett, long-time worker for P. R. and lobbyist for the Citizens Union at the convention, issued a list of forty organizations and political parties opposed to No. 7. In an editorial summary just before the election, *The New York Times* reported that "no responsible quarter" had come out in favor of this shameful deal.

On November 8, popular decision would emerge from this public clamor of advice, claims and counter-claims. A tabulation of the stand taken by various groups, individuals and newspapers follows:

RECOMMENDATIONS TO THE VOTERS

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
|---|-----------------|----------------|---------|-----------|-------|-----------------|----------------|-----------|-----|
| General Amendment | Reapportionment | Grade-Crossing | Housing | Judiciary | Labor | Plan on "P. R." | Social Welfare | Transport | |
| POLITICAL PARTIES | | | | | | | | | |
| American Labor Party | No | No | No | Yes | No | Yes | No | Yes | Yes |
| Communist Party | No | No | No | Yes | No | Yes | No | Yes | Yes |
| Democratic Party | Yes | No | Yes | Yes | No | Yes | No | Yes | Yes |
| Republican Party | Yes | Yes | Yes | Yes | Yes | Yes | No | Yes | Yes |
| Socialist Party | No | No | No | Yes | No | Yes | No | Yes | Yes |
| NEWSPAPERS | | | | | | | | | |
| <i>Buffalo Evening News</i> | — | Yes | Yes | Yes | No | Yes | No | Yes | Yes |
| <i>New York Daily News</i> | Yes | No | Yes | Yes | No | Yes | No | Yes | Yes |
| <i>New York Herald Tribune</i> | Yes | Yes | Yes | Yes | No | No | No | Yes | Yes |
| <i>New York Sun</i> | No | Yes | Yes | No | Yes | No | Yes | No | No |
| <i>New York Times</i> | No | No | Yes | Yes | No | Yes | No | Yes | Yes |
| <i>New York World-Telegram</i> | No | No | Yes | Yes | No | Yes | No | Yes | Yes |
| <i>Rochester Democrat and Chronicle</i> | No | Yes | Yes | No | No | No | No | No | Yes |
| <i>Syracuse Post-Standard</i> (published by Barnum, a delegate) | Yes | Yes | Yes | No | Yes | — | No | No | — |
| INDIVIDUALS | | | | | | | | | |
| Thomas E. Dewey, Rep. | Yes | Yes | Yes | Yes | No | Yes | No | Yes | Yes |
| LaGuardia | No | No | Yes | Yes | No | Yes | No | Yes | Yes |
| Mgr. J. F. A. McIntyre | Yes | — | — | — | — | Yes | — | Yes | — |
| Robert Moses | Yes | Yes | Yes | Yes | No | Yes | No | Yes | Yes |
| Alfred E. Smith | Yes | No | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| OTHER INTEREST GROUPS | | | | | | | | | |
| American Civil Liberties Union | No | — | — | — | — | — | — | No | — |
| American Defense Society | No | — | — | — | — | — | — | — | — |
| Baptist Ministers Conference | No | — | — | — | — | — | — | No | — |
| Brotherhood of Railway Trainmen, State Association, Legislative Board | Yes | — | Yes | — | — | Yes | — | Yes | Yes |
| Chamber of Commerce of Brooklyn | No | Yes | Yes | No | No | No | No | No | Yes |
| of New York State | Yes | — | Yes | Yes | No | — | No | — | Yes |

| | 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | 9. |
|--|----------------------|-----------------|----------------|--------------|-----------|--------------|---------------|----------------|---------|
| | General Amendment | Reapportionment | Grade-Crossing | Housing | Judiciary | Labor | Ban on "P.R." | Social Welfare | Transit |
| Citizens Budget Commission of N Y (Riegelman, counsel) | Yes | — | — | — | — | — | — | — | No |
| Citizens Union of City of New York | No | No | No | Yes | No | Yes | No | Yes | Yes |
| City Affairs Committee of New York | No | No | No | Yes | No | Yes | No | Yes | Yes |
| City Club | No | — | Yes | Yes | No | No | No | Yes | Yes |
| International Labor Defense (legal staff) | No | — | — | — | No | Yes | No | Yes | — |
| League of Women Voters New York State | No | — | — | Yes | No | No | No | Yes | Yes |
| Merchants Association of New York | Yes | — | Yes | Yes | No | No | No | — | Yes |
| National Lawyers Guild, New York City Chapter | No | No | No | Yes | No | Yes | No | Yes | Yes |
| National Municipal League, New York State Committee | No | No | Yes | divi- ded | No | divi- ded | No | Yes | Yes |
| New York State Federation of Labor | Yes | — | Yes | — | No | Yes | — | Yes | Yes |
| New York Real Estate Associa- tion, Executive Committee | Yes | — | Yes | No | — | — | No | No | — |
| Real Estate Board of Brooklyn | No | — | Yes | No | No | No | — | No | No |
| — of Bronx, Inc | — | — | Yes | No | — | — | — | No | No |
| — of New York City | Yes* | — | Yes | No | — | No | No | No | Yes |
| Real Estate Taxpayers Federa- tion, Inc | No | — | Yes | No | — | No | — | No | Yes |
| Roman Catholic Bishops | Yes | — | — | — | — | Yes | — | Yes | — |
| State Industrial Union Council Executive Board (CIO) | No | No | No | Yes | No | Yes | No | Yes | Yes |
| Steuben Society of Am | No | No | No | No | No | No | No | Yes | Yes |
| United Neighborhood Houses, Inc. | No | — | Yes | Yes | No | Yes | No | Yes | Yes |
| West Side Association of Commerce | No | Yes | Yes | Yes | Yes | No | No | No | Yes |
| Women's City Club of New York | No | No | Yes | Yes | No | Yes | No | Yes | Yes |

* *Times* and *Tribune* dispute the stand on amendment 1.

The results of the voting on November eighth continued, so far as the state government was concerned, the pattern which had prevailed for twenty years. The Democrats were successful in electing the governor and other state-wide officers, while the Republicans had a majority in both the Assembly and the Senate.¹⁴ Although Thomas E. Dewey gave Governor Lehman a very close race, neither of the gubernatorial candidates gained as many votes as had been the case in 1936. Some 700,000 fewer votes were cast, with Lehman falling 580,000 short of his 1936 total, and Dewey failing to equal Bleakley's 1936 vote by 123,000.¹⁵

To what extent is this pattern of party success discernible in the popular voting on the proposed constitutional revision? The three amendments which had aroused the loudest cries of partisanship were given the "silent treatment" by the voters. Those voting on apportionment (No. 2), the judiciary (No. 5), and the ban on proportional representation (No. 7) did not equal the number of "blank and void" ballots. That is, of those actually voting for a candidate for governor, less than half indicated a decision on any of these three amendments. Of the three, the prevailing "blank and void" margin was greatest on the ban against proportional representation, least on reapportionment.¹⁶ The ban on proportional representation was defeated upstate, with 779,366 opposed and only 272,092 favoring. Not a single county favored the proposal, while in all but three counties the blank and void ballots exceeded those cast on the proposi-

¹⁴ There was one exception, in 1933, when the Democrats controlled the legislature, as well as the governorship.

¹⁵ Lehman fell behind his 1936 vote by 245,000 upstate and 335,000 in New York City. Dewey trailed the Bleakley vote by 36,000 upstate and 87,000 in New York City.

| | | | |
|-------------------------------------|------------|-----------------|-----------|
| ¹⁶ Total voting on No. 7 | 2,181,527 | Blank and void | 2,512,607 |
| Total voting on No. 5 | 2,191,985 | Blank and void. | 2,503,248 |
| Total voting on No. 2 | 2,273,711. | Blank and void: | 2,425,647 |

tion. In forty-three of the fifty-seven counties the number of those voting on the amendment was less than the relatively small number who had voted on the issue of the convention originally, with the total upstate vote on the latter exceeding that cast on the amendment. In New York City, where the issue of proportional representation was more immediate, a somewhat larger proportion of voters favored the ban on P. R.¹⁷ The amendment was defeated by a vote of 775,038 against 355,031 in favor, with no county approving it.

The ban on proportional representation had been slipped through on one of the frenzied last days of the convention. Neither party organization claimed it, and neither gave it positive support in the appeal to the electorate. The judiciary proposal, however, had been loaded with two political proposals, one of them by a strictly party vote. The Republican party had recommended it to the voters, although Dewey had presented a contrary view. The reception accorded it at the polls was, nevertheless, essentially the same as that given the ban on proportional representation. Not a single county voted in favor of the proposition or came near doing so. Upstate it was defeated by a vote of 738,059 to 323,444. In New York City's five counties, the vote was unfavorable by 812,594 to 317,888. Again, in all but four upstate counties the blank and void ballots exceeded the number of votes cast on the amendment, and the total number voting was less than those voting on the issue of holding the convention.

The apportionment article, more directly than either of the others in the category of "most partisan," was definitely a party measure. This matter was recognized by everyone as being vital to the defense of the political party

¹⁷ A confusion existed in the matter, because to *favor* P. R. was to *disapprove* the amendment, while voting "Yes" meant a vote against P. R.

in control of the convention. As we have seen, consideration of it was kept for the most part within the Republican party, rather than in the convention itself. Nevertheless, the Republican voters did not follow any publicly announced party line nor give allegiance to this proposal which they gave to the state ticket. The measure carried only a single upstate county (Nassau, which was, indeed, the only county to favor it); in forty-one of the upstate counties the number of the blank and void ballots was greater than the number voting on it, and in forty counties the vote was less than had been the case in the calling of the convention. The amendment was defeated by the upstate voters 664,264 to 444,256, the smallest margin of defeat of the three amendments we have discussed, but, nonetheless, a defeat that was virtually state-wide, county by county. In view of the fact that only forty percent as many votes were cast for the amendment as were cast for Dewey and the fact that *thirteen counties cast a larger "no" vote than the Lehman vote* in those counties, it would seem that the Republican voters upstate were not much interested in the apportionment proposal. This is readily understood when one remembers the conflict between the upstate and downstate Republicans at the convention and remembers that the defeat of the proposal left the Republican control intact. The defeat was a blow only at the downstate area, which hit the downstate Republicans and some, but not all, Democratic areas. Despite the fact that the Queens County Democratic organization had favored the proposal, because of their gain in seats allocated, that county voted against the proposal by 25,452 votes. The vote for the five counties was 404,111 in favor, 761,080 against.¹⁸ William S. Bennet, a New

¹⁸ The division of votes on these three amendments was as follows

No. 2. 848,367 in favor; 1,452,344 opposed

No. 5. 641,332 in favor, 1,550,653 opposed

No. 7. 627,123 in favor, 1,554,404 opposed.

York City Republican and delegate to the convention, said that the curious fact about the defeat of No. 2 was that it came from the Republican counties outside New York. But was it really curious? ¹⁹

There was a single amendment which was carried by the so-called downstate area over the opposition of the upstate area. This was on the matter of transit unification (No. 9), which empowered New York City to increase its bonded indebtedness in order to effectuate transit unification. It was voted down by an upstate margin of nearly a hundred thousand votes. Apparently, those who were indifferent failed to vote, so that the total upstate vote was the lowest cast on any one of the amendments. Only one county cast more votes than the "blank and void" ballots. Fifty counties voted "no." Of the remaining seven, four were actually in the metropolitan area and hence had an interest in it.²⁰ The downstate counties carried the amendment by a margin of 470,000, thus overcoming the adverse vote upstate. The total blank and void ballots remained slightly greater than the votes cast on the amendment. Neither upstate nor downstate turned out in numbers equalling the original vote on the convention.

The results on four of the proposed constitutional amendments which were defeated virtually throughout the upstate area have been presented. Let us turn now to those which carried. The amendment which carried the upstate area by the widest margin was No. 3, grade-crossing elimination. It carried by a vote of 756,453 to 471,961, although in thirty counties the vote cast was less than the blank and void ballots and less than the vote on the convention. Despite some talk of upstate resentment at the ear-marking of over half the remaining funds for expenditure in New York City, No. 3 was supported by

¹⁹ Letter to *The New York Times*, November 13, 1938

²⁰ These four were Nassau, Rockland, Suffolk, and Westchester. It carried Rockland by 26 votes, Nassau by 25,470

more upstate counties than was any other amendment which was approved by the upstate area. Only eight counties rejected it, and these eight rejected the entire proposed constitution. Sixteen upstate counties approved only No. 3, rejecting the remainder of the propositions. Thus twenty-four of the upstate counties, comprising virtually the entire central and western part of the state (with the exception of four counties with large urban populations) accepted nothing of the work of the convention, or no more than grade-crossing elimination.²¹

Of the amendments which passed, the housing proposal (No. 4) was approved by the narrowest margin upstate.²² It prevailed by a vote of 594,777 opposed, to 607,713 in favor. In thirty counties the vote was less than on the issue of the convention; in thirty-eight counties the blank and void ballots exceeded the number of votes cast; and in forty counties the amendment was defeated. It is evident that the problem of housing in the upstate area had not reached the stage of being a matter of concern, in terms of constitutional authorization. An examination of the geographical distribution of those counties which favored the amendment or which rejected it by a narrow margin reinforces this generalization. With the exception of two counties, the vote was in favor or close only on the very eastern border of the state, proceeding north from New York City, up the Hudson and north to the border.²³ Of the seventeen so-called upstate counties which favored the proposal, the eight in which it carried by a substantial

²¹ See Chart II below, p. 242. Number 3 was approved by the five downstate counties 805,393 to 423,421. The total vote was 1,561,846 in favor, 895,382 against.

²² It had the third largest margin downstate, which served also to rank it third in the state-wide total.

²³ The two counties were Broome and Chemung, on the south central border. Both have urban population centers of some size. A change of less than 1/5th of one percent of the vote would have swung the decision to the negative in Broome County; a change of 3% in Chemung County would have produced a like result. See Chart IV below, p. 244.

margin were those in or closest to the metropolitan area. As the line proceeds north, the number of voters making a stand diminishes, and the margin of success decreases. The same diminishing popular participation characterizes the seven counties in this area where the margin was close, although negative. In none of the urban population centers west of the Capitol District, in the north central and northwest part of the state (with such cities as Syracuse, Rochester, Buffalo, and Niagara Falls) did the amendment carry or was the vote especially close. In the downstate counties, however, the amendment carried by a wide margin. The vote was 1,686,056 in favor and 341,502 opposed.

Amendments 6 (labor) and 8 (authorizing the expenditure of state funds for social welfare) were the most popular, both upstate and downstate. The vote on No. 6 was 1,869,883 in favor to 940,770 in opposition; on No. 8 it was 1,902,075 (the largest total vote of all) supporting, 943,296 opposing. On the labor proposal twenty-five upstate counties cast fewer votes than on the calling of the convention, but in only fourteen were the blank and void ballots in excess of votes cast. Twenty-five counties also opposed the amendment, which meant adding one more of the northwestern counties to the twenty-four which opposed the entire constitution or all but grade-crossing elimination. On the financing of social welfare, four more counties were added to the opposition list (for a total of twenty-nine).

Of the eight amendments we have thus far considered, four were defeated upstate, but only the three "most partisan" were defeated by the entire state. There remains the omnibus amendment (No. 1), which carried over ninety percent. of the proposals submitted by the convention to the electorate. Despite the label of "non-controversial" attached to this amendment by the convention, as much controversy had centered about it as about

any of the others. The question concerning the fate of such a collection of unrelated proposals was whether the assorted opponents would out-number the assorted supporters. In the course of the debate, many had cited the experience following the 1915 convention to prophesy (or to favor) the defeat of the amendment. *It carried, but by the narrowest state-wide margin of all the adopted amendments.* The vote was 1,521,036 in favor to 1,301,797 opposed. The margin of success upstate (35,533) was the smallest, save for that on housing. Thirty-six upstate counties opposed this amendment, which adds to the twenty-four, cited as a block, twelve more scattered generally about the state. At the same time, the total upstate vote on this amendment was the largest of all (second largest state-wide total), and the number of counties in which the blank and void ballots exceeded votes cast, the smallest (eight).²⁴

²⁴ Some further figures on the amount of popular participation may be of importance. In relation to the number of voters taking a stand on the amendments compared with the number of those voting on the convention, the upstate-downstate roles were reversed. We have seen in our earlier chapter that the convention was called by less than a majority of those voting for governor at the same election, although slightly more than majority participation downstate was offset by less than forty percent participation upstate. In the submission of the amendments to the electorate, the downstate counties voted in smaller numbers on every amendment, while the upstate counties cast more votes (in numbers varying from 33,000 to 365,000) except on Nov. 5, 7, and 9 (three of the defeated amendments).

With 700,000 fewer voters turning out at the 1938 gubernatorial election than in 1936, the ratio of those voting on amendments to those voting on the governorship was somewhat better than the ratio of popular participation in calling the convention. A table on the 1938 participation follows:

Percentage of voters voting for governor which voted on amendments (by counties):

| Percent | 69-60 | 59-50 | 49-40 | 39-30 | 29-20 | Median |
|---------|-------|-------|-------|-------|-------|--------|
| No. 1 | 14 | 35 | 13 | — | — | 34% |
| No. 2 | 1 | 13 | 32 | 15 | 1 | 43% |
| No. 3 | 3 | 23 | 27 | 9 | — | 48% |

It is of interest to look again at the geographical pattern of acceptance and rejection.²⁵ In the New York City counties, the pattern is uniform (with the exception of Richmond, in its vote against No. 9). These five counties approved all but the three "most partisan" amendments. In the rest of the state, however, the picture is much more varied. We have already mentioned the fact that the central and western section of the state (with the exception of a few counties with large urban centers) approved only grade-crossing elimination, with eight counties rejecting all of them.²⁶ There were but four counties following the pattern which prevailed (that is, accepting all but Nos. 2, 5, 7), two of them falling in the metropolitan area.²⁷

| Percent | 69-60 | 59-50 | 49-40 | 39-30 | 29-20 | Median |
|---------|-------|-------|-------|-------|-------|--------|
| No. 4 | 5 | 12 | 38 | 6 | 1 | 45% |
| No. 5 | — | 5 | 35 | 20 | 2 | 41% |
| No. 6 | 7 | 35 | 18 | 2 | — | 51% |
| No. 7 | — | 5 | 31 | 24 | 2 | 41% |
| No. 8 | 8 | 38 | 16 | — | — | 53% |
| No. 9 | 1 | 5 | 30 | 24 | 2 | 40% |

No correlation could be established between acceptance or rejection on the one hand and the percentage of popular participation on the other. There were thirteen counties whose percentages (from the above table) fell below fifty on all amendments and most of these had a substantial number under forty. Of the eight counties rejecting all the amendments and the eight having a greater blank and void ballot than votes cast, only one county fell in both columns.

²⁵ As we have pointed out frequently, the conventional "upstate-downstate" terminology needs to be used carefully. While it has some meaning in terms of "political realities," we have seen its limitations in discussing the personnel and operations of the convention. Similar evidences are revealed in the examination of the voting on the amendments.

²⁶ 8 Counties rejecting all: Lewis, Ontario, Orleans, Schuyler, Seneca, Sullivan, Wayne, Yates.

16 Counties rejecting all but No. 3: Allegany, Cattaraugus, Cayuga, Chautauqua, Chenango, Cortland, Delaware, Genesee, Livingston, Madison, Otsego, St. Lawrence, Schoharie, Tioga, Tompkins, Wyoming. (See accompanying charts and maps.)

²⁷ Albany, Chemung, Rockland, and Suffolk. The latter two may be considered part of the metropolitan area. See Chart I.

Westchester County, also part of the metropolitan area, followed this pattern, except for the rejection of the omnibus amendment. Nassau County, lying within the same area, deviated from the pattern only in being the one county to support No. 2. There were eight counties which followed the pattern which prevailed upstate (that is, the defeat of No. 9 in addition to the other three), while four more followed it except for their rejection of the omnibus amendment.²⁸ In addition to the sixteen counties which accepted only grade-crossing elimination, there were two which added to this the omnibus amendment, three adding only the labor proposal (No. 6), four adding that proposal and social welfare (No. 8) only, and six adding all three of these (omnibus, labor, social welfare).²⁹ In less than one-third of the upstate counties, then, did the pattern of approval follow that which prevailed. In the remainder, the approval ran from spotted to sparse. The initiative taken (limited though it was) by the voters of New York City in calling the convention remained the dominating factor in the approval of its work, even though the Republican party had gained majority control. As we have pointed out, this regional factor cut across party lines throughout the convention.

Other than this vaguely termed "regional factor," it is difficult to measure the effectiveness of the varied leaderships which we have found competing for the approval of the voters. This difficulty is illustrated by the attempt of one writer to surmount it.³⁰

²⁸ The eight counties: Clinton, Columbia, Hamilton, Orange, Rensselaer, Saratoga, Ulster, and Warren

The four counties: Broome, Dutchess, Putnam, and Schenectady

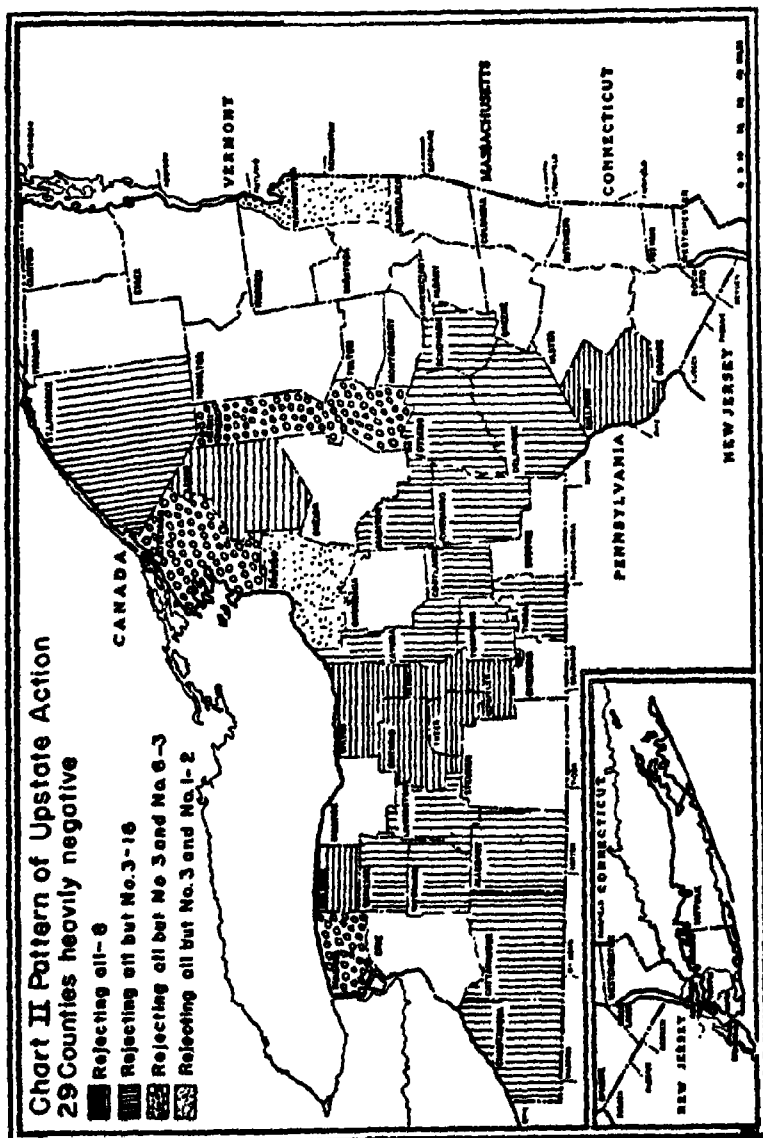
²⁹ Two adding No. 1 to No. 3: Oswego and Washington

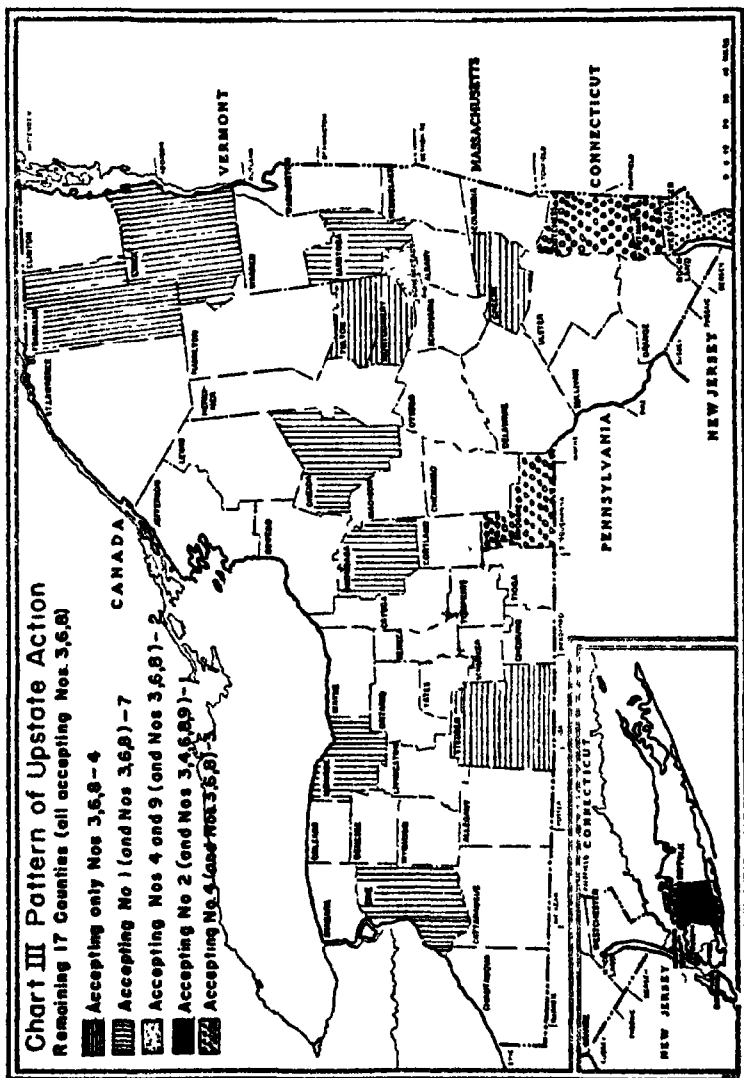
Three adding No. 6 to No. 3: Herkimer, Jefferson and Niagara

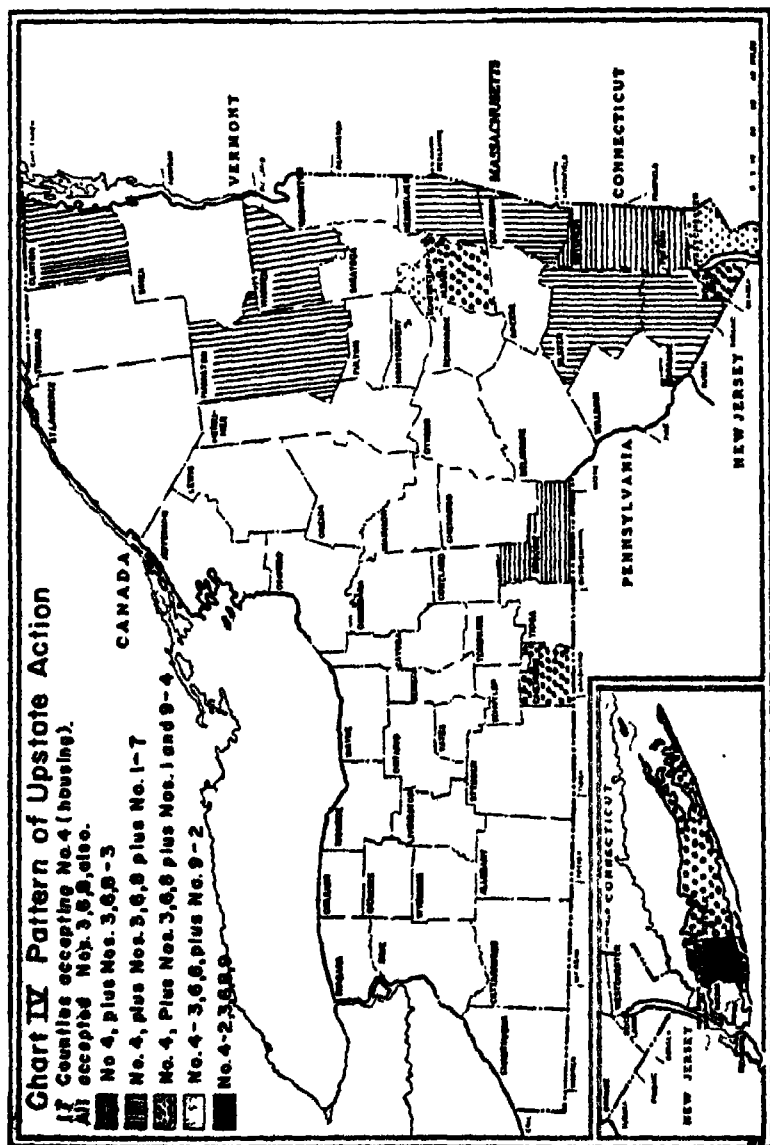
Four adding both Nos. 6 and 8: Fulton, Greene, Montgomery, and Steuben

Six adding all three: Erie, Essex, Franklin, Monroe, Oneida and Onondaga

³⁰ "Constitutional Amendment in New York State," by Madge M.







After careful analysis of the problem, this writer concludes that religious leadership and urban residence were the only two influences which could be isolated as affecting the decision of the voter.³¹ A careful analysis of the vote fails to establish a positive correlation between urban residence, as such, and the action of the voters on the proposed amendments. As has been pointed out, the best correlation would seem to be with residence in and bordering the downstate metropolitan area. The singling out of the leadership of the Roman Catholic Church (which is the author's meaning of "religious leadership"), because of its endorsement of amendments 1, 6 and 8, is similarly unconvincing. In thirty-seven of the fifty-seven upstate counties the total vote on these three amendments (in terms of the percentage of voters voting on the governorship which voted on the amendment) ranked highest. Of these, eighteen approved and nineteen disapproved them. In sixteen cases, however (five of which approved and eleven of which disapproved), there was an equally high percentage vote on at least one other amendment (usually grade-crossing elimination). In nine counties, the percentage vote was high but with rejection of No. 1 and acceptance of the other two (and with an equally high percentage vote in half of them on at least one other); in five counties two of the three were rejected.

In conclusion, one is forced to admit the lack both of the facts and of the techniques necessary to precise measurement of "the way voters make up their minds." It is relatively easy to determine geographical distribution and to itemize forces of leadership and influence. It seems

McKinney, which appeared in the *Public Opinion Quarterly*, Oct. 1939. The article is somewhat obscured by a bold promise at the beginning, which fails to produce a commensurate performance.

³¹ By "isolating" as having "some effect" the author means *measuring*. The article tends to give the impression that influences for which there is no adequate technique of measurement did not have an effect upon the voter. This does not seem justified.

safe and reliable to specify a significant correlation with the regional factor (metropolitan area as against the rest of the state, whether urban or rural), cutting across party lines. On the other hand, the approval of the great part of the convention's submitted work (the omnibus amendment) on the part of the twenty-one counties (nearly all in the eastern section of the state, not counting the five New York City counties, which also approved), by margins sufficient to carry it, produced the result recommended by the two major parties but opposed by the majority of the articulate interest groups and of the metropolitan press, and all the minority parties. How much was this attitude of acceptance a result of specific leadership (the two major parties, the Roman Catholic Church, the convention delegates who had unanimously denominated it "non-controversial" and for whom it was the best evidence that the convention had not failed to achieve a significant result)? How much did it represent the failure, of those opposed, to find a convincing basis for their stand (which rested heavily upon the amount of "legislative" material written into the constitution, or, in general, the failure to reflect the high purpose for which a constitutional convention was supposed to have been called)? It is impossible to give precise answers to these questions, particularly in view of the fact that the electorate could not have had, generally, any detailed understanding of what the omnibus amendment did by way of changing the constitution.

The present writers, therefore, would hazard the observation that approval or disapproval of the un-analyzable omnibus amendment tended to spring from the prevailing reaction to the convention as a whole.²² The state-wide

²² W. S. Bennet, Republican delegate to the convention, declared that Senator Martin Saxe deserved much credit for the approval of No. 1. Had it not been, he writes, for the "omnipartisan" committee Mr Saxe organized and energetically directed, this amendment might well have been lost (*The New York Times*, letter to the editor, Nov 13, 1938.) Mr Saxe was also a Republican delegate.

electorate picked out and rejected the three most partisan amendments. The negative attitude of the upstate counties on the importance of holding the convention was dominantly changed only in the eastern part of the state and in the urban centers upstate; the latter, however, picked out for disapproval a measure, housing, thought to be of interest to urban centers as such. As for the rest of the central and western upstate area, they picked out, if anything, only a relatively minor element in the work of the convention, grade-crossing elimination. The attitude of acceptance, the dominating judgment on the work of the convention, was regional, led by the metropolitan area.

Two days after the action of the electorate on the proposed constitutional changes, *The New York Times* carried an editorial with the caption: "Something Accomplished." The voters, it declared, had not been stumped, but had, in fact, done a "more thoughtful and unbiased job" than had the convention itself. Several weeks later, however, sober second thought led the editorial writer of this same paper to strike a more pessimistic note. The official figures on the election had just been announced, and the editorial was titled "Blank and Void."³⁸ About two and a half million people, the editorial deplored, had cast blank or void ballots on three amendments, a total greater than the number of votes cast. (As we have pointed out above, detailed analysis of the figures shows this situation to have been widespread on other amendments.) The mood of the editorial, however, is more that of sorrow than of censure. It did not feel like criticizing—"the silent majority had too much to do." Nevertheless, the whole episode, concludes the writer, raises anew the doubt as to the wisdom of wholesale amendments to the constitution at stated intervals.

³⁸ *The New York Times*, December 11, 1938.

CHAPTER IX

CAN CONSTITUTION-MAKING BE TAKEN OUT OF POLITICS?

With the popular decision on November 8, 1938, constitution-making reverted to the customary channels of piece-meal revision. Not for twenty years would the people of New York State resume "full sovereign control" over the processes of constitution-making. As we have seen, the actual deviation from the familiar policies of law-making was not so marked during the period of having a constitutional convention as the manner of speaking about it would suggest. Following the termination of the work of the convention, the politicians who had manned it resumed their regular posts. Many of the delegates took up once more their legislative, executive, or judicial duties. No spectacular gains or losses accrued to the delegates, so far as their political careers were concerned. The convention did not build up any Republican to the stature necessary to rival Thomas E. Dewey's drive for the gubernatorial nomination; nor did it seem to affect substantially the relative strength of New York State's political parties. Those, in both parties, who were on the way down or out continued their course, as did those who were on their way up. On a score of fronts, particular matters were being handled differently because of the work of the convention. Details had changed. Some social policies had been liberalized. Another episode in the story of constitution-making in New York State had been completed.

There was a sequel to this episode, however, which followed immediately. The legislature now shouldered the task of translating constitutional authorization into actual policies; in this very real sense, therefore, the legislature shared in the processes of constitution-making. This could

only mean that the pattern of politics at the convention would re-appear as the legislature undertook to implement the "new" constitution. Of course, the fact that the voters had approved some and rejected others of the proposed constitutional changes had defined the area in which the legislature was to operate. Nevertheless, within this area the familiar politics of law-making would determine more specifically the gains and losses produced by the politics of law-making at the convention. The interests which were in competition at the convention remained interested parties as the legislature took over.

The 1939 session of the New York State legislature was a long and stormy one. The converging of a determined "economy drive," on the one hand, and pressure for liberal implementation of the new constitutional authorizations on housing, health and welfare, on the other hand, were the outstanding features of the session. Both these converging pressures were, in turn, part of the political party maneuvering for position in the oncoming presidential elections. An estimated 4000 people descended upon Albany, on February 22, 1939, to demand retrenchment in governmental expenditures. A public hearing was held, which *The New York Times* headlined as follows:

Budget Under Fire Of Albany Throng. Economy Advocates and Relief and Social Services Backers Clash at Hearing. Taxpayers' Revolt Seen. . . .

Herbert L. Carpenter, president of the Real Estate Taxpayers Federation,

told the committees that the people stood 'at the crossroads of the future,' and that it was their responsibility 'to guide this great State either in the direction of sound economy and reduction of expense, which is the only road to recovery, or to permit this wild spending to go on and lead this State into economic chaos and open rebellion of the taxpayers.'

George H. McCaffrey of the Merchants' Association of

New York City (and spokesman also for the Real Estate Taxpayers Federation of the State of New York, the Real Estate Association of the State of New York and the Associated Industries of the State) declared that "'our State services are already at a level beyond our economic ability to sustain.'" A labor spokesman, on the other hand, charged the economy advocates with utter contempt for the clear democratic

mandate of the people, who wrote into our State Constitution the doctrine that the protection and promotion of the health of the people and the aid, care and support of the needy are public concerns.

The difficulties of the legislature, in the face of this controversy concerning governmental expenditures, were increased by the narrow margin of Republican control over the legislature, and by the division within that party. In the view of Warren Moscow,

Had the Republicans at the start been in complete agreement, they might have avoided the cumulative pressure for economy that has grown up, plus the demands of various groups, headed by the local real estate owners, that the pressure of present taxes be eased.¹

Throughout the session, the controversy over the adoption of a sales tax revealed this division. Before the controversy was resolved, by a party conference, it had produced some friction between the legislative leadership and the State Executive Committee, with the latter itself divided. The action taken at the party conference was reported as "in the nature of a revolt against dictation" by members of the Republican State Executive Committee.² The prob-

¹ *The New York Times*, March 20, 1939.

² *The New York Times*, May 12, 1939 "The legislators went into the closed conference irked at leading members of the executive committee, . . . for flatly demanding passage of a sales tax, and at other leaders, . . . for pushing a resolution for investigation of Albany County through the Assembly yesterday without a party conference."

lems of Republican legislative leadership had been further complicated by the death of Senator Perley A. Pitcher, majority leader in the Senate as well as party floor leader at the constitutional convention.

Legislation to implement the new constitutional provision on housing was caught up in the currents indicated above. Early in the session, five measures on housing (four Republican and one Democratic) had been introduced. No definite action had been taken prior to the death of Senator Pitcher on February 20, who was reported as having been party to an agreement that a housing measure must be passed at the current session, and that New York City, because of its greater needs, should get the lion's share of any housing funds.³

The break in party leadership was followed by the "wave of economy" which swept into the legislature and brought with it pressure to postpone action on housing legislation. A resolution was introduced in the Senate, by William F. Condon, Westchester Republican, asking for deferment of the housing program. The resolution stated that, the legislature having been "forcibly impressed" by the desirability of avoiding new taxes, the entire subject of housing should be referred to a legislative commission, to report on February 1, 1940. Reporting this situation for *The New York Times*, Warren Moscow wrote:

Statement against a housing program's being started this year is now high, particularly among the rural Republicans, despite the fact that at the start of the session the party leaders committed themselves to embark on a housing program.

As things stand now, the Republicans may have to turn to the Democratic side for votes if they want to pass a housing bill. This would involve the drafting of a measure acceptable to the Democrats.⁴

³ Warren Moscow in *The New York Times*, February 26, 1939.

⁴ March 8, 1939. As we shall see, this need to appeal for Democratic support did materialize before legislation could be passed.

The encountering of such obstacles to housing legislation was to be expected, in view of what we have seen of the division of opinion at the convention and after. The housing measure had been passed at the convention by a virtually unanimous vote of Republicans and Democrats from New York City, and with the upstate Republicans about evenly divided. The measure had been amended beyond recognition (according to its Republican sponsor), with pressure both from upstate Republicans and some New York City Democrats. The resulting constitutional amendment had been rejected emphatically by the upstate voters in all but seventeen eastern counties. The fight within the Republican party and between the metropolitan and upstate areas would, thus, move naturally into the legislative arena.

Just as controversy over the housing measure had continued until the very end of the constitutional convention, so did it in the 1939 legislature. Near the end of March it was reported that

prospects for the passage at the current session of the Legislature of a conservatively drawn housing and slum clearance measure improved somewhat today as the result of . . . concessions . . . understood to have been made by advocates of a housing program.⁵

The Republican housing bill was not introduced in the

⁵ The concessions had to do with holding to a minimum the amount of funds made available (from the \$300,000,000 bond issue authorized by the constitutional amendment) and with the writing into the law of a clause making it absolutely certain that the State would get its money back from the local authorities. These concessions amounted to a calling to account of such advocates of housing as the State Board of Housing, the chairman of which had protested that "Many do not seem to realize that the loaning of \$300,000,000 of the State's money, with sound judgment and supervision, should cost the State nothing, except the small amount of subsidies which, in the first year, may not exceed \$1,000,000 and at no time may exceed \$5,000,000." March 14, 1939. The news story on the concessions was carried by *The New York Times*, March 28, 1939.

legislature, however, until May 10, and its introduction only served to heighten the controversy. The objections to the bill came from quarters whose interest in housing differed widely. The president of the Real Estate Board of New York "called the suggested legislation 'an out-and-out perversion of the principles upon which public housing was sold to the people of the State' and urged the Legislature to postpone action." The Citizens Housing Council and the National Public Housing Conference charged that certain provisions of the proposed law would expose "the entire housing program to political manipulation" and that others would increase both costs and rentals. Housing groups were reported to be "torn between a desire to criticize features of the Republican Housing Bill and the realization that a split in the organizations backing the measure might endanger the passage of any kind of a bill." * An editorial, with the heading "A Botched Housing Plan," was run by *The New York Times*:

The hopes aroused last Fall when the voters approved the Housing Amendment were dashed this week when the Desmond-Moffatt-Mitchell bills, with the blessing of our Republican legislative majority stamped upon them, were introduced at Albany. . . . The plan as it stands is not satisfactory to those who would like to see public housing go forward, free from political influences and at the lowest possible cost. It might cost so much and work so badly that it would give housing a long-lasting black eye . . .

To many of us it appears that the Desmond-Moffatt-Mitchell bill, as it stands, will do public housing more harm than good. But the situation is not hopeless. The State-Wide Temporary Committee for Housing . . . urges that the original Desmond-Moffatt bill, introduced on Feb. 27, and endorsed by the Citizens Union, the Welfare Council, the New York State League of Women Voters, the Citizens Housing Council and other civic organizations be restored and passed. This original bill may

* *The New York Times*, May 12, 1939.

not have been perfect in all details, but it did represent a non-political approach to the housing problem. The friends of housing would do well to unite on it and urge its adoption before the present session ends.⁷

A statement urging passage of the Desmond-Moffat bill, "to put into effect the will of the voters as expressed in the vote for the housing amendment to the State Constitution," was issued by the Citizens Union. The State-Wide Committee for Housing Legislation issued a statement "deploring the proposals for scrapping or postponing action on the measure, contending that most of those who have argued for postponement 'are the minority, who have consistently opposed housing legislation at every step.'" The Brooklyn Real Estate Board predicted "'a greatly-increased tax burden on both property owners and tenants if the present bills are enacted into law,' and suggested that action on housing be postponed until next year." The City-Wide Tenants Council criticized the amended plan as "showing 'dictatorial disregard' of the will of those who voted for the Housing Amendment." A signed story in the real estate section of *The New York Times* predicted that not "much more than a small part of the ambitious \$300,000,000 plan approved at the polls last Fall would be realized for a long time to come." The original Desmond-Moffatt bills, he wrote,

(which were) introduced in Albany earlier in the session to carry out the 'will of the people' won the support of housing and welfare advocates, but met with opposition from realty interests. The new measures, drawn partly in recognition of the need for economy despite the fact that most of the fund appropriated would have been in the form of housing loans which would have been repaid, have met with scant sympathy even from those most active in supporting slum eradication.⁸

⁷ May 13, 1939.

⁸ May 14, 1939.

With the legislature stalled in its desire to adjourn, and with the controversy over the housing program opening new rifts in the Republican party, Governor Lehman called a conference with the legislative leaders of both parties. Of this move, Warren Moscow wrote:

Although the Governor declined to amplify his announcement, it was regarded here as certain that he was anxious to obtain passage at the current session of a housing bill which would be free of the criticism which has been levelled in the past few days at the bill produced by the legislative conference committee.⁹

The next day the press reported a compromise which had been reached by the bipartisan committee in conference with the Governor. Four "liberalizing amendments" had been agreed upon, so that the resulting bill represented "a compromise between the measure presented last week by the conference committee on housing and the views of such outside housing experts as Ira Robbins (counsel to the State Housing Board), Dorothy Rosenman (representing LaGuardia and civic, social and tenant groups) and others."¹⁰ Governor Lehman stated that the conference agreement would be given bipartisan support in both houses. *The New York Times* editorialized, "Housing Can Go Ahead." Nevertheless, sentiment on the floor of the Senate was reported to be "markedly hostile to the bill in general," and Senator Feinberg (who had voted against the amendment at the convention) proposed that action be postponed until the next legislative session. A few days later, however, "the longest legislative session . . . in twenty-eight years" was brought to a close, and

⁹ *The New York Times*, May 15, 1939. Assemblyman Robert F. Wagner, Jr., sponsor of the lone Democratic proposal, wrote a vigorous letter to *The New York Times*, protesting that the Republicans had worked out their "so-called 'compromise measure'" without consulting a single Democratic member of the legislature and presented it at the last minute on a "take it or leave it basis." May 18, 1939.

¹⁰ *The New York Times*, May 16, 1939.

on that last day the housing measure was passed with bipartisan support. In his final story on this phase of translating constitutional authorization into effective policy, Warren Moscow wrote for *The New York Times* that the Republican

leaders put their foot down firmly . . . on talk of not passing a housing bill, and they pushed this through both Houses, with the help of the Democrats. It would have been impossible . . . had the Democrats opposed them as rural sentiment against a measure of which New York City was the chief beneficiary was very strong.¹¹

In signing the housing bills, Governor Lehman penned a memorandum in which he voiced his great satisfaction with the results produced by the long and arduous course of democratic politics:

With great satisfaction I am giving my approval to these bills designed to implement the low-rent housing amendment adopted at the recent Constitutional Convention and so enthusiastically endorsed by the people last Fall. . . . This law is the culmination of many years of untiring effort on the part of enlightened private citizens as well as public officials. . . . Here is proof that through the orderly and intelligent processes of American Democracy even the most vexing problems find an effective solution.¹²

Having followed the pattern of politics on housing from the convention into the legislature, we may mention more briefly a few other items with similar purpose. The 1939 legislative session failed to implement the constitutional amendment placing municipal pensions on a contractual basis after July 1, 1940. Assemblyman Babcock sponsored, early in the session, bills for the State Legislative Committee of the Conference of Mayors which would clear the way for putting local pension systems on an actuarially sound basis. The Babcock bill was said to have

¹¹ May 22, 1939

¹² *The New York Times*, June 12, 1939.

been introduced chiefly "for the purpose of bringing the opponents and proponents of the measure into conference in committee rooms, so that some bill which has a chance of passage could be agreed upon before the start of the next legislative session. . . ." ¹³ Policemen and firemen continued the opposition which they had expressed at the convention and after, and sought to arouse popular support for their stand. ¹⁴ The Republican leaders of the Assembly and Senate sought, near the end of the session to get a commitment from Mayor LaGuardia on the proposed legislation. The Mayor wrote a carefully guarded letter, pointing out (along with assurances that New York City firemen and policemen were willing to cooperate on a reasonable basis) that he had opposed the proposal when it was introduced at the convention and hence did not consider it his problem. ¹⁵ An editorial in *The New York Times* on May 18 discussed "The Pension Menace," declaring that "possibly the public and its representatives need to be reminded of what this bill means and why its passage at this session is urgent." Nevertheless, the Republican leadership decided not to press the matter because of the probability that the bill would be defeated. The following year (on January 20, 1940) *The New York Times* carried a long letter from Harold Riegelman (counsel to the Citizens Budget Commission and a delegate to the convention), which opened with the remark, "Probably the most important question to come before the Legislature at its present session is that of pensions."

The 1938 Constitutional Convention, through its Bill of Rights Committee, had killed a proposal to legalize pari-mutuel betting on horse races. The proposal was sponsored by Delegate Dunnigan (Democratic leader in the State Senate), under whose leadership the same amend-

¹³ *The New York Times*, March 14, 1939.

¹⁴ See, for example, *The New York Times*, March 14, April 23, May 7.

¹⁵ *The New York Times*, May 16, 1939.

ment had been passed by the previous legislature. Following the convention's refusal to speed up the amending process, the Senator again introduced the proposal in the legislature (in order to secure the second legislative approval necessary to submit the proposed amendment to popular vote). It was passed by the Senate on May 10, but did not come out of committee onto the floor of the Assembly until the very end of the session. At this juncture *The New York Times* wrote, editorially, in approval of legislative action and disapproval of the constitutional convention:

It is a wise decision of the Republican leaders to bring the question of a pari-mutuel system of race-track betting to a vote on the floor of the Assembly. . . . Whether or not it passes both houses of the Legislature, discussion of the issue will clear the atmosphere and reinforce the argument that the State should have the means of controlling an evil which it is powerless to suppress.

The last Constitutional Convention chose to reaffirm the unobserved provision of the Constitution which forbids gambling. Gambling has not ceased since then and will not, because the people of the State tolerate it in its milder forms. Of all systems of regulating race-track betting the pari-mutuel . . . has proved the best and fairest. The revenue to be derived from it would be a well considered point at this time of struggle over the budget. More important is the argument that the amendment would restore to the Legislature those legitimate powers which it cannot now exercise because of a stultifying clause in the Constitution.

The amendment passed the Assembly and was ratified by the voters in November, 1939.

In the area of State court reform, efforts were made to start a new constitutional amendment, to replace Amendment Five which was defeated by the voters. The Citizens Union of New York City sent a letter to the legislature, urging that it not adjourn without "some competent agency" being charged with the task of preparing a new judiciary article; the letter declared, further, that the de-

feat of Amendment Five had been caused by the introduction of the "political provisions."¹⁶ A few days later a group of bar and civic leaders sent a communication to Governor Lehman and the legislative leaders urging similar action. This group, however, declared that "Proposition No. 5 at the last election was the only non-political and nonpartisan proposal of the recent Constitutional Convention to be defeated." An editorial in *The New York Times* added its voice, saying that "Three years have been lost by the failure of last Summer's Constitutional Convention to give us a better judiciary amendment."¹⁷ In a letter to the president of the Women's City Club, however, Senator Feinberg, chairman of the Senate judiciary committee, declared that the legislature would not act on the bills at the current session. Explaining this inaction, he declared that

a measure providing for noncontroversial reforms . . . was drafted by the judiciary committee of the recent Constitutional convention and rejected by the voters only because two amendments were added on the convention floor¹⁸

A certain amount of adverse criticism was directed at the 1938 Constitutional Convention by the 1939 legislature, as the tasks of implementing the new constitutional provisions were undertaken. One example of this kind of carry-over from the convention to the legislature was a

¹⁶ *The New York Times*, April 14, 1939.

¹⁷ April 18, 1939 These urgings were directed to the support of the Coudert-Mitchell bills, which provided for a mixed commission of lawyers, judges and laymen to consider proposals to amend the judiciary article and report back to the legislature

¹⁸ *The New York Times*, April 30, 1939. This news story was based on an exchange of letters between Senator Feinberg and Mrs. Samuel Duryee, president of the Women's City Club, which were made public by the latter. In her reply to Senator Feinberg, Mrs. Duryee "urged a reconsideration of the committee's stand." She expressed disagreement, as had the Citizens Union and *The New York Times*, "with his view on the desirability of the amendment suggested by the convention committee"

sudden flare-up of resentment which occurred at a Republican budget conference. The Republican program, as prepared by the fiscal leaders of the party, eliminated the budgetary appropriation for the salaries of official referees (former Supreme Court judges who handled some judicial duties). When one of the leaders at the conference moved that this item be restored, the suggestion "was 'howled down' from all corners of the room, and a denunciation of judges, sometimes bitter and sometimes profane followed."

'Let the judges go to work' was one of the more charitable remarks reported after the conference. Back of some of the resentment is the domination that the judiciary exercised in the recent Constitutional Convention. The resentment was fairly apparent during the convention itself, and instead of tapering off, it appears to grow worse. Every time the legislators have to try and find out what the new Constitution means in some particular regard, any one having anything to do with the convention comes in for muttered abuse.

Recently a proposal for a constitutional amendment was introduced by Senator Young of Lewis County, which would bar members of the judiciary from being elected as delegates to any future Constitutional Convention.¹⁹

The constitutional convention had, thus, opened up some new channels for the politics of legislative policy formation, although in most instances the initial detail was provided by the convention itself.²⁰ Significant, more-

¹⁹ *The New York Times*, April 19, 1939. The present writers found considerable evidence in Albany of the low regard in which the convention and its work were held by members of the legislature when they came to the problem of interpreting and implementing it. The above incident is cited as one dramatic instance of this.

²⁰ Among other important pieces of legislation passed by the 1939 legislature to implement the new constitutional provisions were, that permitting free transportation of children attending private and parochial schools under the same conditions as children attending public schools; that providing State health and welfare services in private and denomina-

over, is the fact that the convention functioned and was kept within the existing framework of politics and governmental structure. It proved itself to be the child of the *status quo* in the same sense as is the ordinary legislature—that is, on the edge of the future, but securely grasped by the present. No significant changes in governmental structure were looked upon with favor, or even with interest. Only minor modifications were introduced in the existing pattern of local home-rule. Nothing was done to establish new relations with the federal government, while the dominant contrary tendency was implemented in minor instances (e. g., taxation of banks). The *status quo* on the political party front was maintained, which meant that apportionment and districting for the legislature were kept securely in the hands of the Republican party. It also meant that no reconciliation between upstate and downstate Republicans, or between New Deal and anti-New Deal Democrats, had taken place. Hence, the distinction between "organization politics" ("job politics"), where party lines would hold, and "policy politics," where party lines would be crossed, remained a primary factor in party politics. The *status quo* on the political party front also meant that the ever-apparent reality of the regional conflict between New York City and "upstate" remained an adjunct of party politics and hence only interstitially a "political-constitutional" reality.

We have followed the politics of constitution-making from the 1938 Constitutional Convention into the 1939 legislature. We turn now, finally, to an appraisal of constitution-making in New York State's democracy.

tional schools; that prohibiting any form of racial or religious discrimination in civil service employment, that protecting those who patronize and frequent retail stores and establishments, beauty parlors, public halls and elevators against unjust discrimination on account of race, color or otherwise; that implementing the new home rule provisions; and that rearranging the terms for financing grade-crossing elimination.

The constitutional convention, as a device for giving the people of New York State direct access to constitution-making, rested on the political experience of more than a century of constitutional self-government. This experience, once the first constitution had gone into action, cut out its own channels. The convention method of revision took root gradually from the failure of the first constitution to provide for its own amendment. The first constitutional convention held for purposes of revision did not appear to think well of this device, holding it to be both impractical and dangerous. This convention declared it to be the duty of the legislature, primarily, to initiate and direct the process of amendment. The procedure for future constitutional amendment adopted by the convention reflected this view. *Constitution-making* was not to be indulged in freely.

The conservatism of the Convention of 1821 had its roots in a dilemma. The convention sought to subordinate the people to the legislature in the business of constitution-making (through amendment). It sought also, however, to subordinate the legislature both to a difficult process of amendment and to a constitution made rigid by the inclusion in it of detailed particular policies. Its distrust of the legislature was second only to its distrust of the people. This distrust was of constitutional change, from whatever source; confidence was reserved for a constitution of approximate permanence. As one studies the detailed provisions this convention wrote into the constitution, one is startled to realize that the confidence shown was in the particular details the members of this convention had seen fit to put in. The embodiment of detailed policies in the constitution made agitation for change inevitable, but change was frowned upon and made difficult by the process of amendment prescribed. Against further constitution-making were brought the high-sounding appeals to the nature of constitutions as *fundamental law*.

The process of "freezing" had thus set in. This, more than anything else, has determined the subsequent course of constitutional revision. Provision for amendment by constitutional convention was introduced by the Convention of 1846, as a consequence of the political deadlocks which had recurred to prevent revision. Already, however, constitution-making had been grooved into the channel cut by the Convention of 1821. Just as the framers of New York's first constitution had confidence in themselves, and hence were not concerned with detailed specifications, so did subsequent constitution-makers have confidence in themselves—but their confidence had to be reinforced by the introduction of detailed policies. Constitution-makers were turning out a varying mixture of detailed policy and of more general empowering clauses. The constitutional convention was re-introduced to perform this kind of function, rather than to elevate constitution-making to that higher level on which it has been kept by amateur and professional political theorists.

The Constitutional Convention of 1938 was a lineal descendant of this political development. Its function was heavily that of modifying old detail with new. The dominant pattern of constitutionalism was retained. That is, constitutional limitations were primary and detailed—with the power of the legislature to act under its own discretion hedged in by a detailed written constitution and by the courts. In the eyes neither of the "people" nor of the courts was the legislature the seat of power in determining policy. This power was shared by the courts and by "last season's constitution-makers." The Convention of 1938 worked within this frame of reference. It did not alter fundamentally the mixing of detail and declaratory principle. The convention was urged by some delegates to put into the constitution a broad empowering provision on social welfare, which would give the legislature a large discretion in this area (and keep judicial curbs at a mini-

mum). In place of such a far-reaching delegation of power to the legislature, however, piece-meal changes were made and a detailed policy on housing included.

The constitutional convention has become, therefore, an instrument for the making and unmaking of detailed policy. This development has been part cause and part effect of the forces which have converted state constitutions into a similar mixture of detailed policy, detailed limitations and general enabling clauses. The constitutional convention has become a faithful reflection of the kind of constitution-making the politics of democracy has fostered. In New York State, the constitutional convention, not the legislature, is the body endowed with undefined power to prescribe the fundamental organization and power of government, as well as particular, detailed policies. As we have seen, however, this kind of statement is accurate in itself, but misleading. A given, particular constitutional convention is by no means in *effective possession* of "undefined power." As an *ad hoc* instrument of government, temporary and short-lived, the convention is very much a creature of the times which prevail as the calendar turns up the designated date. While its work is formally subject to the approval of the people (although not its sins of omission), the more effective limitations lie in other quarters. As we have seen in the case of the 1938 Convention, political parties are certain to compete for the kind of control which will yield them a maximum of advantage without their assuming full responsibility. The convention is not likely to rise above the prevailing political party level nor to escape established patterns of political leadership. Indeed, it would be a curious commentary on the operating techniques of political democracy were the convention to be thus cut off. What substitute techniques and leadership could the convention contrive which would hold it responsible? This is especially important, in view of the almost insurmountable

complexities and technicalities of its task, within the time limits practicably available.

If the constitutional convention has become an instrument for detailed policy making and unmaking, working under the pressures and within the limitations of its immediate time, then the character of a given convention is not to be deduced from the tradition that a constitution is a kind of *higher law* worked out by a body of *wise men*. The actual processes of constitution-making will inevitably reflect factors which characterize the ordinary processes of law-making. The "voice of the people" to whose will the convention is officially dedicated, will, in these days, be heard through the medium of the many organized groups which have become the intermediaries between the people and their government. For purposes of systematic presentation, we have stressed the distinction between *job politics* and *policy politics*. This terminology, however, should not obscure the fact that these two kinds of politics shade into each other. The ordinary legislator's concern for "job politics" must include keeping his organization in power and himself in office, without his becoming too closely committed to "policy politics." In doing this, the legislator has come more and more to view his function as that of a "broker." He is the arbiter of multiple and conflicting interests; he helps to achieve, by mediation and compromise, a policy which expresses a public interest. In so far as he does this, he pits his *job politics* against what is essentially the private-interest *job politics* of the pressure group. It would be too much to claim that all legislators provide this broker's function or that they have discovered and used effectively a formula for distilling the public interest from the many partial interests. The doing of this to some degree, however, is the essence of the politics of democracy. Is the constitutional convention above this problem of politics, as the traditional view tends to insist? Or, indeed, is it in even

as favorable a position to carry on this process as is the legislature?

The provision for periodic submission of the question of a constitutional convention was to circumvent obstructive political leadership. In achieving this objective, the 1938 Convention was left without constructive leadership until after the decision to hold it was made. The absence of leadership and the relatively low popular interest in the issue shouldered this "people's convention" with an uncertainty as to its mandate which was never entirely dispelled. The *New York Herald Tribune* referred to the convention, three weeks before it completed its work, as one "which nobody particularly wanted and which there seemed very little reason for calling to begin with."²¹ Democracy had been confronted with one of its enduring dilemmas. While it must look with suspicion upon its leaders, it cannot do without leadership. In avoiding obstructive political leadership, democracy found its leadership indulging in a "sit-down."

Did this initial, somewhat apathetically won, victory mean that the "people" were to revise their constitution without benefit of "politics"? Were the "people" to organize spontaneously and find leadership outside the channels of politics and party leadership? The answers to these questions, as we have pointed out, were not long in coming. The party organizations picked the slates of delegates, through the direct primary, with virtually no popular opposition or participation. Months before the convention assembled, its leadership had been chosen by the party leaders. When the convention met, its leadership and organization were set up in record time, with the only friction in those early weeks arising out of the distribution of patronage. The convention "which nobody particularly wanted" had settled into the traditional chan-

²¹ Editorial, July 30, 1938.

nels of leadership, even though it was still uncertain as to the details of its mandate. In this manner the questions posed above were answered. Were these the wrong answers? They were the inevitable answers. They were the answers which should have been anticipated. They were, indeed, the natural answers, demonstrating merely that democracy is not and cannot be above politics, that the processes of democracy do not operate in a vacuum nor without leadership.

Having been steered finally into the stream of politics, the convention pursued its course. Party leadership dominated, but did not entirely control, the unwieldy, heterogeneous membership. The purely organization aspects of party politics (e. g., apportionment) shaded into the parties' "policy politics" of social liberalism, where contact was made both with pressure groups and with the spirit of the times. The committees weeded down the hundreds of individual proposals to a middle-of-the-road minimum, so that many of the delegates rated the negative accomplishments of the convention as among the most, if not the most, important.²² This negative action was challenged from the floor in some instances, some of them for easily defined political (party) reasons (e. g., water power, searches and seizures), some of them led by rebellious delegates who were then supported from the ranks of both parties (e. g., the ban on P. R., civil service preference for all veterans, judicial review of the facts on which administrative action was taken). A different kind of challenge to the work of committees was expressed in

²² This statement is based on the answers to questionnaires, referred to above. Less than one-third of the total membership responded to the questions concerning their evaluation of the work of the convention and their judgment of the convention method of constitutional revision. Even though this partial response makes it impossible to lay too much stress upon this source, there were quite a few intelligent responses and suggestions from those delegates who did reply. Some further mention of these answers will be made below.

the prevailing frequency with which amendments from the floor riddled the measures reported out. This led one veteran legislator-delegate to deplore the legislative inefficiency of such action and led another to recommend that future conventions have fewer judges and "enough legislators to maintain sound, workable procedure."

There was a widespread feeling among the delegates that partisanship or "politics" had been too prominent at the convention. The convention as a whole had given expression to this feeling in the provision, ratified by the electorate, changing the date for the next constitutional convention. Many delegates cited this, in responding to the questionnaire, as an important step in removing political and partisan considerations from future conventions. Along with this, numerous other suggestions were made for the alleviation of such factors in the future. Offsetting the proposal, mentioned above, that there be more legislators, several delegates suggested that persons holding office or about to run for office should be ineligible in the competition for seats at the convention. One delegate would have future delegates barred from public office for a period of at least two years subsequent to the convention. Another advocated election of delegates by proportional representation and nonpartisan ballot, asserting that a large share of the unfortunate aspects of the 1938 Convention was a result of political party control of the delegates. Others advocated a convention of fewer delegates, declaring the present size to be unwieldy and ineffective. One delegate recommended a smaller body, serving without pay, while another favored increased pay so that the delegates would stay on the job and more effectively curb the activities of pressure groups. A further factor stressed was the inadequacy of time, in view of the enormous task confronting the convention.

There were some proposals for increasing the effectiveness of the convention which went much further than

those we have mentioned. Very few of the delegates gave public evidence of agreeing with former-Governor Smith's denunciation of the convention as a method of constitutional revision. Very few agreed with the delegate who said flatly that the convention was to a large extent a failure, or with the one who declared there should be no more conventions. The suggestions of some, however, indicated similarly negative judgments. Several delegates were of the opinion that necessary amendments might better originate with the legislature. One of these held that not only would there have been a substantial financial saving, by not holding the convention, but also the new articles would have had more serious consideration if presented after passage by the legislature. Another delegate recommended that there be created a permanent commission, of a small, nonpartisan character, to study constitutional questions to be submitted to the legislature or a future convention. Similar was the proposal that "an unbiased, nonpartisan, nonpolitical fact-finding commission should assemble such factual data concerning the effectiveness of existing Constitutional provisions and proposed changes for the benefit of the Convention." Another recommended that there be established a continuing bureau to consider proposed amendments and to conduct research on the problems involved and their relation to existing constitutional provisions. A Joint Legislative Committee was suggested by another delegate, to be created every five or ten years for the purpose of studying needed changes and reporting back to the legislature. Perhaps a more novel approach to the problem of reducing the political aspects of constitution-making lay in the suggested distinction between controversial and noncontroversial matters. Amendments of a "strictly noncontroversial nature" could be passed by the convention without submission to the voters, thereby lessening the confusion in the minds of the general public; a matter would be deemed noncontro-

versial if passed by an overwhelming majority (which, at the 1938 Convention, would have included the ban on P. R.!). Another suggestion would have carried this kind of change still further, with the power of the convention to be absolute, "subject only to referendum initiated by the people." Still another would limit the power of the convention to the consideration of matters previously passed, either by the legislature or by popular referendum. This summary of suggestions by the delegates should include, also, the emphasis by several delegates of the gain in popular education, which they held to be a vindication of the convention's importance to the democratic process.

How are we to assay these suggestions made by delegates to New York State's eighth constitutional convention? What judgment can be made concerning the role of the constitutional convention in the operation of democracy? To answer these questions, let us review the underlying pattern of our analysis.

The effective functioning of constitution-making today does not rest upon the perpetuation of anti-politics attitudes and arguments. It would seem to be futile, and even dangerous, for a democracy to think of the problem as that of taking constitution-making out of politics. Is this not, in effect, saying that we should take politics out of democracy? The *New York Herald Tribune* voiced an apology "for the naive notion that a constitutional convention could be other than a political body." Surely this makes better sense, in a democracy, than the assertion by the same newspaper that "a framework of government and a declaration of basic rights lucidly and gracefully expressed" is "all that any constitution should be." Indeed, the same editorial page recognizes this in the further remark: "It (the convention) has not attempted a thoroughgoing reconstruction of the constitution into a 'streamlined' body of genuinely organic law; but when one considers the great amount of statutory details long

embedded in the present document, and the extent to which the structure of government in the state has formed itself around these provisions, it is doubtful whether that would have been practicable." ²³ A realistic recognition of the character of constitution-making in our present democracy may well suggest some needed changes. Such suggested changes should not, however, be naively dedicated to the stamping out of "politics." Very little, therefore, may be expected of the new provision in New York State's constitution for having the next convention in an "off-year."

What of the various suggestions for "taking the people out of constitution-making"? Has the constitutional convention lost its value as an instrument of democracy, because of the present technical character of constitution-making and the proliferation of the politics of popular action? To this question, one may respond with the query, "What happens to democracy if the techniques of popular control cannot be improved and made adequate to its more complicated problems?" Even though the constitutional convention is not a revolutionary agency equipped to look upon society as a *tabula rasa* upon which it may write new political prescriptions at will, does it retain no positive function of value? The possibility of obstruction and stalemate in constitutional adaptation is increased if constitution-making is left entirely to party-controlled legislative bodies. In a society dedicated to self-government, a regularized procedure for appeal from the politics of current political vested interests can be of great value. There is no guarantee possible that the elimination of the politics of popular constitution-making in favor of the politics of legislative constitution-making would be an improvement. There can be no question of banishing politics, but rather that of by whom and how politics shall be played. In a self-governing society, it is salutary to give institu-

²³ Editorials on July 13, 23, and 30, 1938.

tional expression to the fact that the authority of the people as a whole is superior to the authority of the political agents in charge of the daily conduct of things political.

The importance of the constitutional convention is not to be measured merely in terms of the actual breaking of deadlocks on constitutional revision. There is considerable evidence that the experience of popular constitution-making has a residual value of great importance to a self-governing society. This value lies in the psychological and educational increment arising from the total process of popular participation in constitution-making. Criticisms of the constitutional convention from the point of view of *efficiency* or of *politics* must be tempered by a recognition of the popular sense of participation in this important phase of self-government. While analysts of the democratic process have sometimes deprecated such psychological factors and classified them as mere "ceremonial," we have seen opponents of self-government seize upon and manipulate these factors in support of alternative systems. We have stressed throughout our analysis that the nature of constitution-making has been obscured; it has been obscured by referring to it in terms derived from a level of abstractions which are descriptive neither of the processes nor of the problems. We would not press the emphasis, however, to the point of "throwing out the baby with the bath." The irreducible fact, a fact of importance to the democratic process, remains, that some kind of popular participation is being enacted. To dismiss this as "merely going through motions" is to distort essential psychological factors by an approach which clings to an abstract ideal while blocking the path thereto. One might ask, what would the citizens of democracy be doing while their affairs were being managed by others?

If neither politics nor the people can be taken out of constitution-making in a democracy, are there ways of

rendering popular participation more effective? With the present technical character of constitution-making, the people and their constitution-makers need positive measures and improved techniques to assist them. The effective functioning of constitution-making today will not be achieved by indiscriminate reference to anti-politics symbols and theories. Nor is constitution-making adequately served merely by mechanical devices (such as holding conventions at periodic intervals) for circumventing obstructive political leadership. We have seen that this also serves to combine lack of leadership with ample opportunity for party leadership to promote its own interests at the proper moment. The mere fact of formally provided popular participation in constitution-making might, however, be more effectively implemented. Measures might be devised which would aid in the achievement of both a more informed public and a more responsible leadership, each being to a certain extent a function of the other. A better informed public, by affording a more independent check upon the political leadership, could lead to greater responsibility, while conceding that the "people" do not act without leadership. One problem is that of pushing those who will actually lead in constitutional revision into earlier, more frank and more complete acceptance of responsibility.

The various suggestions, discussed above, for some more or less permanent agency to function in the area of constitutional revision seem to merit some careful consideration. There seems to be a real need for some kind of technically proficient "constitutional revision committee." Its function might be compared with that of the "legislative council," which operates so effectively in several states, except that such a committee would function on the level of constitutional revision. This committee might be permanent, or it might function periodically—say, every five years. It should function, at least, during the

two years prior to the submission to the voters of the question of a convention. It should be a small, non-partisan committee and yet have close working relations with legislative leaders (which means, also, with political party leaders), pressure group leaders, and others. Only in this way could its work be well-grounded in realities and relevant to the forces which impinge upon the processes of constitutional revision. In other words, it should act as a competent clearing house for proposed constitutional changes. Its function should combine a technically competent analysis of existing constitutional provisions and proposals for change, as well as their relations to each other. It should, also, elaborate techniques for informing the public.

Such a committee would have no direct constitution-making function. The latter function would continue to operate in accordance with the present pattern. At the same time, such a committee would help avoid the 1938 experience in New York State, where the people had no informed basis for deciding upon either the necessity or the agenda of a convention; and where the political parties shouldered responsibility slowly and without adequate public knowledge and pressure. The work of this kind of committee should afford the voters an independent basis for passing upon the issue and agenda of a convention, with a greater sense of existing problems and those which would confront any convention. The leadership could then settle back, as it does in any case, into the existing channels, without encouraging irresponsibility. In the past, committees have been hastily set up, *after the decision to hold a convention has been made*, to compile volumes of data which offered little for the use either of the public or the delegates. A "constitutional revision committee" should be able to function more relevantly and more adequately in the service of both.²⁴

²⁴ The present writers have made no effort to blue-print this idea down

In the interests of a more informed public, some other changes could be suggested. There should be a greater lapse of time between the adjournment of the convention and the submission of its work to popular vote. The proposals should be submitted separately. Greater public responsibility should be borne for the dissemination of informative and educational material on the matters coming before the voters. The money spent in the legalistic fulfillment of present requirements (resulting in the printing of the proposals in newspapers over the state in type too small to be read) might be diverted into more educational channels, or in some manner supplemented.

The extent to which our thinking about the nature of constitution-making is faulty and should be corrected deserves a final emphasis. Our thinking about the nature of constitution-making should be more in line with the facts and less a repetition of certain conventional abstractions and assertions. It is confusing to the public to find editorial writers, educators and other leaders of public opinion referring to the problem of constitution-making in terms which have little relevance to prevailing conditions; and which serve to discredit anything which the convention might do with the cry of "politics." It is sufficiently difficult for democracy to hold its practices to worthy standards, without having those standards set by abstractions which, if valid, discredit much of the democratic process as we know it.

These recommendations do not rest upon the premise that their adoption would produce an informed, avidly enthusiastic participation in constitution-making by all the people. Rather, they rest upon the premise that any democracy which takes itself seriously must seek improve-

to the last detail. The principle, if accepted, would need to be worked out in a way which made sense in the system of which it would become a part

ments in its techniques consistent with its basic confidence in popular self-government. If the theory of constitution-making were brought into closer contact with present problems of constitution-making; if the public were independently informed as suggested, so that it could know what to demand of its leaders—if these things were done, then self-government would acquit itself better than it otherwise does.

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